Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-229

UNITED STATES OF AMERICA,

Petitioner,

—v.—

ANTONIO DIONISIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

[1] The opinion of the court of appeals, the denial of the Government's petition for rehearing, the district court's memorandum on the request for exemplars, and the order of judgment and commitment holding Dionisio in contempt were printed at pp. 12-26 of the Appendix to the petition for a writ of certiorari.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
Feb. 1, 1971	Special Grand Jury for February 1971 as indicated on the jury venire for February 1971 is drawn and empaneled before Chief Judge Edwin A. Robson. Eldred Du Sols and Margaret G. Floyd sworn as Foreman and Deputy Foreman respectively and Frank L. Lude sworn as Marshall in charge —Robson, J.
Feb. 18, 1971	Filed Government's Petition for court order directing Antonio Dionisio to furnish voice exemplars before and to the special Feb. 1971 grand jury.
Feb. 18, 1971	Filed Memorandum in opposition to petition for court order directing witnesses to furnish exemplars before Feb. 1971 Grand Jury.
Feb. 18, 1971	Order Government's petition for court order requiring respondent to furnish voice exemplars entered and set for disposition on Feb. 19, 1971 at 10:30 A.M., with respondent to respond by 2:00 P.M. this date—Robson, J.
Feb. 18, 1971	Filed Answer to Government's petition for court order directing Antonio Dionisio to furnish voice exemplars before and to the special Feb. 1971 grand jury.
Feb. 18, 1971	Filed Memorandum of law in support of Antonio Dionisio's answer to Government's petition for court order directing the witness to furnish voice exemplars before and to the special Feb. 1971 grand jury.
Feb. 19, 1971	Enter order on Government's petition directing Antonio Dionisio to furnish voice exemplars before and to the Special Feb. 1971 grand jury—DRAFT.

DATE	PROCEEDINGS
Feb. 19, 1971	Filed Memorandum and Order on Government's Petition to compel voice exemplars —Robson, J. (copy)
Feb. 22, 1971	Filed Petition to set bail.
Feb. 22, 1971	Filed Affidavit of Arthur H. Zimmerman, counsel for A. Dionisio
Feb. 22, 1971	Enter order holding Antonio Dionisio in direct and continuing contempt of Court for failure to obey order of Feb. 19, 1971 heretofore entered herein and order defendant hereby committed to custody of the U.S. Marshal until respondent shall obey said order or until the expiration of eighteen months. Order petition to set bail hereby denied—DRAFT—Robson, J.
Feb. 23, 1971	Issued 2 certified copies order to U.S. Marshal
Feb. 23, 1971	Filed Notice of Appeal of Antonio Dionisio
Feb. 24, 1971	Certified and transmitted Record on Appeal to U.S.C.A.
Feb. 26, 1971	Transmitted and certified to U.S.C.A. Documents filed and orders entered 2-18 and 2-19, 1971 as part of the Record on Appeal.
Mar. 1, 1971	Filed Appeal Bond—$2,500.00, Surety —Antonio Dionisio
Mar. 1, 1971	Filed Clerk's File Copy of Transcript of Proceedings had before Judge Austin on Feb. 16, 1971, filed by official court reporter (Re: Jack O'Brien and Robert Plummer).
Mar. 1, 1971	Filed Clerk's File Copy of Transcript of Proceedings had before Judge Robson on Feb. 19 and 22, 1971, filed by official court reporter (Re: Albert Dini, et al).

DATE	PROCEEDINGS
Mar. 10, 1971	Enter order directing Clerk to certify to U.S. Court of Appeals, as part of record on appeal, transcripts as set forth herein—DRAFT—Robson, J. (A. Dionisio and Charles Bishop Smith).
Mar. 11, 1971	Certified and transmitted 4 volumes of transcript to U.S.C. as part of the record on appeal.
Mar. 12, 1971	Filed Clerk's File Copy of Transcript of Proceedings had before Judge Robson on Feb. 23, 1971, filed by official court reporter (Re: Albert Dini, et al) (1 vol.)
Mar. 16, 1971	Certified and transmitted 1 volume of transcript to U.S.C.A. as part of the record on appeal.
Nov. 16, 1971	Records returned from the U.S.C. Appeals.
July 13, 1972	Filed request from the SUPREME COURT OF THE UNITED STATES REQUESTING 71-G-J 466 for certiorari.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLLINOIS
EASTERN DIVISION

IN RE: ANTONIO DIONISIO A WITNESS BEFORE THE SPECIAL FEBRUARY 1971 GRAND JURY	)))	NO. 71 GJ 466

GOVERNMENT'S PETITION FOR COURT ORDER DIRECTING ANTONIO DIONISIO TO FURNISH VOICE EXEMPLARS BEFORE AND TO THE SPECIAL FEBRUARY 1971 GRAND JURY

Now comes the petitioner, WILLIAM J. BAUER, United States Attorney for the Northern District of Illinois, and represents to this Honorable Court as follows:

1. The SPECIAL FEBRUARY 1971 GRAND JURY for the Northern District of Illinois is now conducting an investigation of alleged illegal activities in said District: said investigation involves possible violations of federal criminal statutes. Antonio Dionisio has been subpoenaed by said Special Grand Jury and fully advised that he is a potential defendant in its investigation.

2. It is essential and necessary to the aforesaid Special Grand Jury investigation that Antonio Dionisio furnish before and to the said Special Grand Jury, or to any duly appointed agent of the said Special Grand Jury, exemplars of his voice as transmitted over the telephone. Such exemplars will be used solely as a standard of comparison in order to determine whether or not the witness is the person whose voice was intercepted pursuant to this Court's orders 70 C 2510 and 70 C 2601.

3. Respondent, Antonio Dionisio, appeared pursuant to subpoena before the SPECIAL FEBRUARY 1971 GRAND JURY on February 17, 1971.

4. Respondent, ANTONIO DIONISIO, was then and there given a transcript marked SPECIAL GRAND JURY EXHIBIT 13. The exhibit gives names of persons, numbers of races and horses, and other information which

the foreman of the said SPECIAL GRAND JURY directed the said respondent to read while talking into a telephone which was connected to a recording device. Respondent refused, to read the transcript asserting his constitutional privilege against self-incrimination.

5. Petitioner contends that mere voice exemplars are identifying physical characteristics outside the protection of the Fifth Amendment. Petitioner further contends that respondent has no constitutional privilege whatsoever to refuse to furnish exemplars of his voice, as demanded by the Special Grand Jury. *Gilbert* v. *California*, 388 U.S. 263, 265-267 (1967); *Schmerber* v. *California*, 384 U.S. 757, 761 (Fn. 5), 764 (1966); *United States* v. *Wade*, 388 U.S. 218, 222-223 (1967); *Higgins* v. *Wainwright*, 424 F. 2nd 177 (5th Cir. 1970); *Schmidt* v. *United States*, 380 F. 2nd 22 (5th Cir. 1967) *cert. den.*, 390 U.S. 908.

Wherefore, petitioner prays that this Honorable Court issue its order directing respondent, ANTONIO DIONISIO, to furnish, before and to the SPECIAL FEBRUARY 1971 GRAND JURY of the United States District Court for the Northern District of Illinois, or to any duly appointed agent of said SPECIAL GRAND JURY, such exemplars of respondent's voice as the said Special Grand Jury deems necessary.

Respectfully submitted,

WILLIAM J. BAUER
United States Attorney

By /s/ Lee Allen Hawke
LEE ALLEN HAWKE
Special Attorney
Department of Justice

Special Attorney
Department of Justice

LAH:mtst

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: ANTONIO DIONISIO A WITNESS BEFORE THE SPECIAL FEBRUARY 1971 GRAND JURY	))))	NO. 71 GJ 466

ORDER

On petition of WILLIAM J. BAUER, United States Attorney for the Northern District of Illinois, the Court having read and considered said petition and having heard the argument of counsel, finds:

1. The SPECIAL FEBRUARY 1971 GRAND JURY for the Northern District of Illinois is now conducting an investigation involving possible violations of federal criminal statutes.

2. Respondent, ANTONIO DIONISIO, appeared before said Special Grand Jury on February 17, 1971. The Foreman directed respondent to furnish voice exemplars, as more fully set forth in the petition of the United States Attorney. The respondent refused to furnish said exemplars, asserting his Constitutional privilege against self-incrimination. Said privilege was improperly asserted by respondent. Respondent has no Constitutional privilege to refuse to furnish said voice exemplars demanded by the Special Grand Jury.

IT IS THEREFORE ORDERED that respondent, ANTONIO DIONISIO, furnish before and to the SPECIAL FEBRUARY 1971 GRAND JURY of the United States District Court for the Northern District of Illinois, or to any duly appointed agent of said Special Grand Jury, such exemplars of respondent's voice as the said Special Grand Jury deems necessary.

ENTER:

/s/ Edwin A. Robson
EDWIN A. ROBSON
Chief Judge
United States District Court
for the Northern District
of Illinois

Dated at Chicago, Illinois, this 19 day of February 1971.

LAH

IN RE: GRAND JURY INVESTIGATION) GRAND JURY NO. 71-GJ-466

BEFORE THE FEDERAL GRAND JURY

(Special February, 1971 Grand Jury)

February 17, 1971
10:00 o'clock a.m.

PRESENT:

THE HONORABLE WILLIAM J. BAUER, United States Attorney, by MR. LEE A. HAWKE, MR. HERBERT BEIGEL, Chicago Strike Force, Department of Justice, Chicago, Illinois.

(THE GRAND JURY, having convened at 10:00 o'clock a.m. on February 17, 1971, pursuant to adjournment, met in closed session and the following proceedings were had herein:)

ANTONIO DIONISIO

having been first duly sworn by the Foreman to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. BEIGEL:

Q Will you please state your name and spell your last name for the Grand Jury?
A Antonio Dionisio, D-i-o-n-i-s-i-o.
Q And where do you reside?
A 2702 North Ashland.
Q Now, Mr. Dionisio, I would like to inform you that this is a Federal Grand Jury which is investigating possible violations of federal criminal law, more specifically Title 18 of the United States Code.

I would also like to advise you that you are a possible defendant in this investigation by the Grand Jury. Do you understand that?

A Yes.

Q I would also like to advise you that you have a right to have counsel outside this Grand Jury with whom you can consult at any time you desire?

Do you understand that?

A Yes.

Q Do you have an attorney with you?

A Yes.

Q What is his name?

A Art Zimmerman.

Q Is he outside this Grand Jury room?

A Yes.

Q I would also like to advise you that anything you may answer to my questions may be used against you in a later court proceeding. Do you understand that?

A Yes.

Q And that you can refuse to answer any question which you think or believe would tend to incriminate you. Do you understand that?

A Yes.

MR. BEIGEL: Will you mark this as Grand Jury Exhibit 13?

(Said document was marked as Grand Jury Exhibit 13 and dated and initialed by

BY MR. BEIGEL:

Q Mr. Dionisio, I would like to hand you Grand Jury Exhibit No. 13 and ask you to look at it. Have you finished examining it?

Mr. Dionisio, if the Foreman of this Grand Jury instructs you to read Grand Jury Exhibit No. 13 into a telephone, in an office on this floor, in the presence of a special agent of the Grand Jury, and have your voice recorded, would you abide by that request?

A I refuse to give any voice exemplar based on the rights guaranteed me under the Fourth and Fifth Amendments.

Q The Foreman of the Grand Jury is going to instruct you to give an exemplar of your voice, and if you wish to refuse to do that, please state such to the Foreman.

THE FOREMAN: Mr. Dionisio, I would like to request you to read Grand Jury Exhibit No. 13 in the presence of a special agent of the Grand Jury, over the telephone, for the purposes of having it recorded on a recording device.

Will you do so?

BY THE WITNESS:

A I refuse to give a voice exemplar based on the rights guaranteed me under the Fourth and Fifth Amendments.

BY MR. BEIGEL:

Q Mr. Dionisio, since you have refused to give a voice exemplar, we are continuing your subpoena until 10:00 a.m. tomorrow morning, at which time you are to appear in Judge Robson's court, on the 25th floor of this building. At that time the Government will present a petition to the Court asking the Court to order you to give a voice exemplar.

You may also bring with you your attorney tomorrow morning at ten o'clock. Do you understand?

A Yes.

MR. BEIGEL: You are excused.

(Witness excused.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 GJ 466

IN RE ALBERT DINI, ET AL., WITNESSES BEFORE THE SPECIAL FEBRUARY 1971 GRAND JURY

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HONORABLE EDWIN A. ROBSON, Chief Judge of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, February 19, 1971, at the hour of 10:30 o'clock a.m.

PRESENT:

HON. WILLIAM J. BAUER, United States Attorney, by MR. LEE ALLEN HAWKE, Assistant United States Attorney,
appeared for the government;

MR. THOMAS L. ROBINSON,
appeared for respondent Jackson;

MR. MICHAEL NASH,
appeared for respondent Harrison;

MR. ANTHONY A. BUCCI,
appeared for respondent Bouris;

MR. FRANK G. WHALEN,
appeared for respondents Charles Bishop Smith and Halley James Smith;

MR. BERNARD BRODY,
appeared for respondents Parrillo, Leavitt and Grafner;

MR. JOSEPH A. ETTINGER,
appeared for respondents Turner, Pieroni, Maring, Venturelli, and Beck;

MR. WILLIAM J. STEVENS,
appeared for respondent Helmer;

MR. JOHN J. COGAN,
appeared for respondent Imparato;

MR. ARTHUR ZIMMERMAN,
appeared for respondent Dionisio;

MR. HARRY J. FREEMAN and MR JAMES GUCH,
appeared for respondents Box and Dyer;

MR. BARRY GOODMAN,
appeared for respondent Martino;

MR. NEIL BROWN,
appeared for respondent Cazado;

MR. SHERMAN MAGIDSON,
appeared for respondent Rose;

MR ETTINGER: Your Honor, I also represent Mr. Maring, and the comments I made with regard to Mr. Turner, I would hope would be incorporated in the record.

THE COURT: All right, they may be incorporated in and made a part of the record as your objections and contentions in connection with this witness.

The Court will enter an order requiring this witness to give voice exemplars. If he fails so to do, he may be held in contempt of court for failure to do so and imprisoned for a maximum of 18 months for contempt or until he purges himself of that contempt.

MR. ETTINGER: Under compulsion of the Court, we will comply.

THE CLERK: In re: *Antonio Dionisio.*

THE COURT: And this will be on Monday morning also?

MR. ETTINGER: Yes, your Honor. I stipulate that they will all be on Monday morning.

MR. ZIMMERMAN: Judge, for the record my name is Arthur Zimmerman and along with Mr. Ettinger, we represent Antonio Dionisio.

At this time we would like to take the opportunity to adopt all pleadings and objections raised by other coun-

sel on behalf of their witnesses, some of which we have not seen, of course; and obviously we take objection to your Honor's ruling.

THE COURT: All right. It may be incorporated in and made a part of the record of those heretofore made by other counsel and by Mr. Ettinger in behalf of this witness. You are also appearing on his behalf?

MR. ETTINGER: Yes, your Honor.

THE COURT: What is your name for the record?

MR. ZIMMERMAN: Zimmerman, your Honor, Arthur Zimmerman.

MR. HAWKE: Since we have Mr. Ettinger involved in this, I was wondering about time schedules.

MR. ZIMMERMAN: There won't be any problem with the time schedule in this one.

THE COURT: Do you want to appear today then?

MR. ZIMMERMAN: Yes.

MR. ETTINGER: No, Monday, because I will be here for all of them. So it will be 9:00 Monday.

THE COURT: The Court will enter an order here requiring this witness to give voice exemplars before the Grand Jury. If he fails so to do, he will be held in contempt and be sentenced and incarcerated for a maximum of 18 months or until he purges himself of that contempt.

All right, call the next one.

THE CLERK: In re: James J. Venturelli.

MR. ETTINGER: Good morning, your Honor.

THE COURT: You may incorporate all objections and arguments made on behalf of Mr. Turner; and the Court will enter an order requiring this witness to give voice exemplars at a time that is agreed to by the United States Attorney and your counsel. If you fail so to do, you may be held in contempt of court and imprisoned up to 18 months or until you purge yourself of contempt by giving voice exemplars.

MR. ETTINGER: Thank you, very much, your Honor.

THE COURT: All right, thank you.

THE CLERK: In re: George Bouris.

MR. BUCCI: If your Honor please, I had appeared earlier in this proceeding and asked to be heard. However, I wasn't aware that your Honor had already fixed his judgment, so that any argument I may make might be academic at this point. I simply would like to lay on the record in that I did not file a memorandum, that the objection by this witness, "potential defendant," is propelled by the Fourth and Fifth Amendments to the U. S. Constitution. I would like to join my brother

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
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No. 71 GJ 466

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TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HONORABLE EDWIN A. ROBSON, Chief Judge of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday, February 22, 1971, at the hour of 10:00 o'clock.

PRESENT:

HON. WILLIAM J. BAUER, United States Attorney, by MR. L. A. HAWKE and MR. H. BEIGEL
appeared for the United States of America;

MR. JOSEPH A. ETTINGER and MR. ARTHUR H. ZIMMERMAN
appeared for respondents Turner, Dionisio, et al.,

the only reason they are being brought forth—

THE COURT: It says they might be.

MR. HAWKE: Potential defendants.

MR. ETTINGER: Your Honor, the second point is that this specific statute, Section 6002, says that anyone who asserts the privilege of self-incrimination and is then ordered to testify, must be granted immunity.

THE COURT: That was all argued by several counsel, Mr. Ettinger. That motion will be denied.

Are there any other motions?

MR. ETTINGER: Yes, your Honor. At this time I would advise the Court that Mr. Antonio Dionisio will refuse to give a voice exemplar today.

THE COURT: All right. If he does refuse, then I will pass on it at that time.

MR. ETTINGER: Well, your Honor, he can make his refusal before the open court at this time, Judge. He is in court and will make his refusal at this time.

THE COURT: Is he present in open court?

MR. ETTINGER: Yes, he is, your Honor.

THE COURT: All right. He may step forward.

(Brief interruption.)

THE COURT: You may proceed.

MR. ETTINGER: Your Honor, in behalf of the witness Antonio Dionisio, we would at this time advise the Court that he will refuse to furnish the voice exemplar pursuant to the order issued by you on Friday of this past week. He does so based upon his privileges against self-incrimination.

MR. HAWKE: Your Honor, the government will prepare a petition, if the Court so directs us to, on the contempt.

THE COURT: All right. Prepare it and present it at 2:00 o'clock this afternoon. Is that agreeable?

MR. HAWKE: Yes.

MR. ETTINGER: Your Honor, will he remain at liberty at —

THE COURT: No, in that he is refusing he will be taken into custody at the present time. I will enter the order.

MR. ETTINGER: Your Honor, I would move at this time for the setting of a bond pursuant to the statute.

THE COURT: No, he is being held in contempt of court, and bond will be denied.

MR. ETTINGER: Your Honor, the statute specifically provides provisions for bond. This statute, the statute under which he has been brought before the Court, specifically provides for the placing of a bond at the time that a witness becomes recalcitrant. That is under Title 8 of the Act.

THE COURT: Well, I will allow him to remain at large until 2:00. I will take a look at the section of the Act.

MR. ETTINGER: Thank you very much, your Honor.

THE COURT: Until 2:00 o'clock.

MR. ETTINGER: That would be Section 1826.

THE COURT: All right, thank you.

MR. HAWKE: Thank you, your Honor.

MR. ETTINGER: Thank you.

(Which were all of the proceedings had in the above-entitled cause on the day and date aforesaid.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 GJ 466

IN RE ALBERT DINI, ET AL., WITNESSES BEFORE THE SPECIAL FEBRUARY 1971 GRAND JURY

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable EDWIN A. ROBSON, Chief Judge of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday, February 22, 1971, at the hour of 2:00 o'clock p.m.

PRESENT:

HON. WILLIAM J. BAUER, United States Attorney, by MR. L. A. HAWKE and MR. H. BEIGEL
appeared for the United States of America;

MR. JOSEPH A. ETTINGER and MR. ARTHUR H. ZIMMERMAN
appeared for respondents Turner, Dionisio, et al.

order as it was signed yesterday.

THE COURT: You had a right to a copy of the order.

MR. ETTINGER: I was never furnished with one. I asked the Clerk if a supplemental had been filed and he said no, the only one that was filed was the one that had been furnished by the Government's attorneys. I looked at a copy that was submitted for another of the defendants. I did not have one for Dionisio. I thought that that was the same order that had been entered for this defendant.

THE COURT: All right. I want to make that a part of the record here, to clearly show it.

Now, we have a petition to set bail. I see that the motion is signed by Arthur H. Zimmerman.

MR. ZIMMERMAN: That is correct, your Honor.

THE COURT: Aren't you counsel also in this, Mr. Ettinger?

MR. ETTINGER: Co-counsel, your Honor.

MR. ZIMMERMAN: We are co-counsel.

THE COURT: All right, but it is just signed by Mr. Zimmerman.

We have a judgment of commitment order. I changed the last paragraph.

It is therefore ordered that respondent Antonio Dionisio be and he is hereby committed to the custody of the United States Marshal for the Northern District of Illinois, until such time as respondent shall obey said order or until the expiration of 18 months.

That will be the order that the Court will enter at this time.

Now, we have your petition for bail here, to set bail. For the purpose of the record, I want to state that last Friday when this came up you asked for a continuance until this morning so that the respondent here could appear at the same time other witnesses of yours were appearing to give exemplars of his voice. This morning you came in on a motion in which you stated that he refuses to give those exemplars.

Now, I ask whether or not that was to forestall the entry of an order, and if you had knowledge that he did not intend to give exemplars of his voice.

MR. ZIMMERMAN: If I might just respond briefly.

THE COURT: I am asking counsel here who made the representation.

MR. ETTINGER: Your Honor, I had a conversation with him along those lines. I brought everybody here at 9:00 o'clock this morning, your Honor. They all

SUPREME COURT OF THE UNITED STATES

No. 71-229

UNITED STATES, *Petitioner*

v.

ANTONIO DIONISIO

ORDER ALLOWING CERTIORARI. Filed May 30, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and is to be argued with No. 71-850.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 472687 38

INDEX

CITATIONS

441-246—71——1

In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO DIONISIO AND CHARLES BISHOP SMITH, WITNESSES BEFORE THE SPECIAL FEBRUARY 1971 GRAND JURY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 12–19) is reported at 442 F. 2d 276.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1971. On June 14, 1971 the court of appeals denied a petition for rehearing with suggestion for rehearing en banc (App. B, *infra*, pp. 20–21). On July 8, 1971, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and

including August 13, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fourth Amendment bars compelling a grand jury witness to furnish the grand jury a voice exemplar for comparison with exhibits consisting of recordings of lawfully intercepted wire communications.

STATEMENT

The Special February 1971 Grand Jury in the Northern District of Illinois is investigating illegal gambling. It has received as exhibits voice recordings obtained under court orders, based on warrants issued under 18 U.S.C. (Supp. V) 2518, authorizing interception of wire communications.

The grand jury subpoenaed approximately twenty persons, including respondents Smith and Dionisio, and sought to obtain from them voice exemplars for identification purposes. Each witness was informed that he was a potential defendant in a matter being investigated by the grand jury. Each was asked to examine a transcript of a recording of an authorized intercepted communication and to go to a nearby room and read the transcript into a telephone connected to a recording device.[1] Smith and Dionisio appeared on separate days; each refused to give a voice exemplar, one asserting a Fifth Amendment privilege and the other asserting rights under both the Fourth and Fifth Amendments. (App. A, *infra*, pp. 12–13.)

[1] The witnesses were to give the exemplars outside the grand jury room, so that they could have their lawyers present. App. A., *infra*, p. 13.

Separate petitions were then filed in the district court seeking orders directing respondents to furnish voice exemplars for comparison with the recordings. Following a hearing, the district court ordered them to furnish the exemplars.[2] Both respondents subsequently refused to do so. The district court adjudged them guilty of civil contempt, and committed them to prison until they obeyed its order or the grand jury term expired (App. D and E, *infra*, pp. 25–28).

The court of appeals reversed (App. A, *infra*). It rejected the claim that the grand jury's request for the voice exemplars violated respondents' rights under the Fifth and Sixth Amendments, but concluded that to compel compliance with the request would violate their Fourth Amendment rights. In the court's view, the grand jury was "seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars" (App. A, *infra*, p. 17). The court held that this "seizure" of physical evidence contradicted the "standard of reasonableness" required by the Fourth Amendment, as recently construed in *Davis* v. *Mississippi*, 394 U.S. 721. Equating the grand jury's procedure to the police arrests involved in *Davis*, the court concluded that "[t]he dragnet effect here, where approximately twenty persons were subpoenaed for purposes

[2] The district court rejected the claims made by a number of the witnesses in a memorandum opinion dated February 19, 1971 (App. C, *infra*, pp. 22–24).

of identification, has the same invidious effect on fourth amendment rights as the practice condemned in *Davis*" (id. at p. 19).

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the proper application of the Fourth Amendment in the context of grand jury proceedings. The decision below greatly expands the protections afforded by the Fourth Amendment in such procedings, by requiring that a grand jury request for physical evidence from a witness subpoenaed before it must meet the same test of "reasonableness" as that applicable to police arrests. This holding is in sharp conflict with the essential function of the grand jury, and will seriously interfere with the broad investigatory powers heretofore exercised by it. Moreover, the decision is not necessary to safeguard the protected rights of a witness before the grand jury. In the circumstances, review of such an important decision by this Court is appropriate.

1. The grand jury is, of course, established in the Constitution "as the sole method for preferring charges in serious criminal cases," thus indicating "the high place it [holds] as an instrument of justice." *Costello* v. *United States*, 350 U.S. 359, 362. As the "great historic instrument of lay inquiry into criminal wrongdoing" (*United States* v. *Johnson*, 319 U.S. 503, 512), it serves not only as an accusatory body, but also as "an important safeguard to the citizen against open and public accusations of crime." *Hannah* v. *Larche*, 363 U.S. 420, 499 (Douglas, J., dis-

senting). As this Court observed many years ago in *Blair* v. *United States*, 250 U.S. 273, 282:

> It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. * * *

This broad investigative power entitles the grand jury to investigate on its own initiative, and gives it the right and indeed the duty to pursue all leads and examine all witnesses to find if a crime has been committed. See *Hannah* v. *Larche, supra; United States* v. *Stone*, 429 F. 2d 138, 140 (C.A. 2); *United States* v. *Winter*, 348 F. 2d 204, 208 (C.A. 2), certiorari denied, 382 U.S. 955. It need establish no factual basis for commencing an investigation, and can pursue rumors which further investigation may prove groundless. Witnesses before it are "not entitled to set limits to the investigation that the grand jury may conduct." *Blair* v. *United States*. In short, the grand jury need not have probable cause to investigate; rather its function is to determine if probable cause exists. As this Court said in *Hale* v. *Henkel*, 201 U.S. 43, 65: "It is impossible to conceive that * * * the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object

of the examination is to ascertain who shall be indicted."

Necessarily, this power carries with it the right to obtain testimony and evidence from the witnesses appearing before the grand jury. Giving testimony and evidence to the grand jury "are public duties which every person * * * is bound to perform upon being properly summoned." *Blair* v. *United States, supra,* 250 U.S. at 281. While this duty is subject to exceptions in limited circumstances (*ibid.*), society's interests ordinarily are best served by a thorough and extensive investigation. *Wood* v. *Georgia,* 370 U.S. 375, 392; *Hannah* v. *Larche, supra,* 363 U.S. at 499 (Douglas, J., dissenting).

2. The holding of the court of appeals that a grand jury request that a witness furnish physical evidence directly connected to the matter under investigation must satisfy the reasonableness test applicable to police arrests breaks with all precedent.

To be sure, this Court has recognized in carefully limited circumstances that the grand jury process may impermissibly infringe Fourth Amendment rights. See, *e.g., Hale* v. *Henkel,* 201 U.S. 43. That case and its progeny dealt with the production of documents under a subpoena *duces tecum,* and stand for the proposition that seizure of evidence may constitute an unreasonable search violative of the Fourth Amendment if the subpoena is overbroad. As the court below noted, the rationale for those decisions "is that general fishing expeditions into the private affairs of witnesses" unreasonably invade their right of privacy

(App. A, *infra*, p. 16). This situation has little in common with the present case, where the "invasion" of respondents' privacy is exceedingly narrow—only voice exemplars are sought. Like fingerprinting, this "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search," and is "an inherently more reliable and effective crime-solving tool." *Davis* v. *Mississippi*, *supra*, 394 U.S. at 727. And it is a "general fishing expedition" only in the sense that every grand jury proceeding is, as a result of that body's broad mission to ferret out the facts without knowing in advance of what is involved or where its investigation will lead. To compel respondents to furnish the exemplars sought here would not, in our view, be an "unreasonable" invasion of their right to privacy. Compare *Schmerber* v. *California*, 384 U.S. 757, 771.[3]

It is the essence of the grand jury proceeding to question and obtain evidence from a witness in circumstances that would not permit detaining him under any traditional probable cause standard. In this respect, of course, the grand jury's powers exceed those of most investigatory bodies, including the police; but this is necessarily so, we think, in view of the fact that the ultimate purpose of the grand jury is to determine if probable cause exists. Thus, the absence of probable

[3] Significantly, a witness subjected to an overbroad subpoena is not, under the *Hale* v. *Henkel* rationale, left free to ignore completely the grand jury's request. Instead, the correct remedy is to modify the subpoena by excising from it the overbroad and unduly burdensome elements; the witness must then comply with the modified subpoena. Cf. *United States* v. *Ryan*, No. 758, O.T. 1970, decided May 24, 1971.

cause is to be expected, and does not make unreasonable the action ordering the exemplars here.

The court's reliance on *Davis* v. *Mississippi* is misplaced. *Davis* held that the Fourth Amendment was violated when the police obtained fingerprints during an extended involuntary detention not based on probable cause or on a judicial order. The court below considered that the procedure here for obtaining exemplars "has the same invidious effect on fourth amendment rights as the practice condemned in *Davis*" (App. A, *infra*, p. 19). But we perceive no basis for equating the two. The grand jury's investigation of possible criminal activity is not limited by restrictions customarily applicable to other authorities; and the carefully circumscribed subpoena in this case, seeking only voice exemplars to compare with exhibits, is wholly different from the unjustified detention by the police in *Davis*. Unlike the suspect in *Davis*, respondents would not be taken into custody or removed from their normal mode of life. The inconvenience to them in performing their "civic duty" before the grand jury would be minimal, and that inconvenience is no greater than the inconvenience of giving testimony, which the grand jury clearly has the power to compel. The taking of a voice exemplar is not a "search" or "seizure," any more than the giving of testimony is a search or seizure.

In *Davis*, the Court noted that it was "arguable" that because of the unique nature of the evidence involved there (fingerprints), even a police detention "might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even

though there is no probable cause in the traditional sense" (394 U.S. at 727). Voice exemplars are a similar kind of evidence. And the method by which the exemplars would be obtained here was "narrowly defined" to minimize the intrusion into respondents' private affairs, involving no detention at all. Thus, even under the *Davis* test, compelling the exemplars would not violate respondents' Fourth Amendment rights. See also *Gilbert* v. *California,* 388 U.S. 263, 266-267, where the Court, in dealing with "a handwriting exemplar," said it was "like the voice or body itself," and was "an identifying * * * characteristic" outside the protection of the Fifth Amendment.

3. The holding in this case, if not corrected by this Court, threatens to impede the grand jury's performance of its traditional function, by unduly limiting its right to obtain voice exemplars. In essence, it would require the government to litigate the question of "reasonableness" before enforcement of a grand jury subpoena seeking this type of evidence. Such litigious interruptions of the grand jury process have long been discouraged by this Court. See, *e.g., United States* v. *Ryan,* No. 758, O.T. 1970, decided May 24, 1971; *Di Bella* v. *United States,* 369 U.S. 121; *Cobbledick* v. *United States,* 309 U.S. 323. Moreover, the rationale of the court's decision is not confined to voice exemplars, but would apply as well to other physical evidence of a similar nature, such as handwriting exemplars or fingerprints, compare *United States* v. *Doe,* 405 F. 2d 436 (C.A. 2), and its logic would also extend to any time a witness is subpoenaed before a grand jury or requested to bring in books

and records, since any such subpoena necessarily involves some interference with the individual's right of privacy.

Judicial scrutiny of this sort, with the resulting delays and impediments to grand jury proceedings, is unnecessary to safeguard the witnesses' protected rights. To be sure, respondents are suspects in the grand jury proceedings here, and their exemplars may increase the risk they run of being charged with an offense. But respondents have no protected right to be free from indictment; the risk they run in this regard is no different from that of any citizen. "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States, supra,* 309 U.S. at 325. Rather, the court below sought to protect respondents' right of privacy, and to bar "wholesale intrusions" upon that right by reason of grand jury subpoenaes (App. A, *infra,* p. 18). In this case, however, as we have argued above, there would be little if any "intrusion" into respondents' private affairs under the procedure envisaged. And that procedure was designed to safeguard respondents' other rights as well, by providing that the exemplars would be given outside the grand jury room so that counsel could be present.[4]

[4] The fact that a number of witnesses were asked to use the procedure set up by the grand jury did not produce any "dragnet effect" (App. A, *infra,* p. 19) or make the procedure unreasonable as to respondents. The number of persons involved is not, by itself, determinative. Insofar as a right of privacy can be founded on the Fourth Amendment, it is a

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
WM. TERRY BRAY,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
Attorney.

AUGUST 1971.

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personal right, and turns on the oppressiveness of the action complained of to the individual. *Wong Sun* v. *United States*, 371 U.S. 471; *Alderman* v. *United States*, 394 U.S. 165. If an individual were repeatedly ordered to appear before a grand jury and give voice exemplars, that might involve oppression that would be analogous to an overbroad subpoena. Of course, that does not resemble the situation here, where each individual has been asked only to give one voice exemplar at a reasonable time and place.

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

SEPTEMBER TERM, 1970 JANUARY SESSION, 1971

(Nos. 71–1155, 71–1157)

[In Re Antonio Dionisio and Charles Bishop Smith, Witnesses Before the Special February 1971 Grand Jury]

ANTONIO DIONISIO AND CHARLES BISHOP SMITH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

MARCH 25, 1971

SWYGERT, *Chief Judge,* FAIRFIELD and KERNER, *Circuit Judges.*

PER CURIAM. This is an appeal by Antonio Dionisio and Charles Bishop Smith from separate orders finding them in contempt of court and committing them to custody for failing to furnish voice exemplars to the Special February 1971 Grand Jury for the Northern District of Illinois.

On February 17 and 19, 1971, Dionisio and Smith, having been called before the grand jury and advised that they were potential defendants in its investigations, refused the jury's request that they furnish voice exemplars which would be compared with voices

contained on Federal Bureau of Investigation tape recordings of telephone messages intercepted pursuant to a court-ordered wiretap.

On February 19 (Dionisio) and February 23 (Smith), the district court ordered that the two witnesses:

> furnish before and to the SPECIAL FEBRUARY 1971 GRAND JURY of the United States District Court for the Northern District of Illinois, or to any duly appointed agent of said Special Grand Jury, such exemplars of respondent's voice as the said Special Grand Jury deems necessary.

The manner in which it was proposed to take these voice exemplars is as follows. The witness would be taken to an office of the United States Attorney and would be requested by FBI agents to read from a transcript of the conversations which the FBI had recorded earlier pursuant to the court-ordered wiretap and with which the witness' voice was to be compared. While reading from this transcript, the witness would speak into a telephone and his voice would be recorded on a machine operated by other FBI agents in some other room in the building. The witnesses would be permitted to have their counsel present at the United States Attorney's office where the scripts were to be read.

Both Dionisio and Smith refused to furnish the requested voice exemplars; and on February 22 (Dionisio) and February 23 (Smith), they were committed for contempt for their refusal to comply with the district court's order. Dionisio and Smith filed notices of appeal on February 23.

The district court, having determined that the appeals were frivolous and taken for delay, refused the witnesses' motions to set bail or to stay the com-

mitment order pending appeal. *See* 28 U.S.C. § 1826(b). On the witnesses' emergency motions, this court found the constitutional questions raised too substantial to justify characterizing the appeals as frivolous and ordered the witnesses admitted to bail.

Appellants contend that the procedure attempted by the grand jury violated their fifth amendment privilege against self-incrimination. This is not the law. *United States* v. *Wade*, 388 U.S. 218, 222–23 (1967); *cf. Gilbert* v. *California*, 388 U.S. 263, 265–67 (1967), and *Schmerber* v. *California*, 384 U.S. 757, 764 (1966). They further contend that the procedure violated their sixth amendment right to counsel. That contention is also without merit, particularly in view of the option extended to the appellants under which their attorneys would be permitted to be present. *Cf. Gilbert* v. *California*, 388 U.S. 263, 267 (1967).[1]

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[1] These arguments do point out the extent of the Government's involvement in the grand jury's processes. The parties did not brief this troublesome point, and no authority which would justify the grand jury's assumption of power to appoint agents has been cited to us. The fifth amendment's grand jury requirement is "a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused. . . ." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962). Delegation of the power to receive subpoenaed evidence raises the question whether the grand jury function would be subverted by requiring the production of voice exemplars before FBI agents stationed in the office of the United States Attorney. This court has indicated that a grand jury might turn over subpoenaed evidence to experts, including government agents, so that those persons might examine the evidence and report on it to the grand jury. *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956). But that holding does not go so far as to authorize the jury to require a witness to report directly to government agents for examination or for the purpose of turning over evidence which is recorded and retained by the Govern-

Appellants also urge that the compelled production of voice exemplars for the grand jury upon its subpoena violates their rights under the fourth amendment. This argument raises an important and seemingly novel question.

It is now settled that the fourth amendment is applicable to the grand jury process. *Hale* v. *Henkel,* 201 U.S. 43 (1906). That case dealt with the production of documents under a subpoena duces tecum. The Court believed that a grand jury "order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment." *Id.* at 76. Applying the test of reasonableness, the Court held the subpoena to be overbroad, stating that, "A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms." *Id.* at 77.

Since *Hale* v. *Henkel,* courts have struck down grand jury subpoenas which were unreasonable under the fourth amendment. *Schwimmer* v. *United States,* 232 F.2d 855 (8th Cir.) *cert. denied,* 352 U.S. 833 (1956); *see Application of Linen Supply Cos.,* 15 F.R.D. 115 (S.D.N.Y. 1953). As stated in *Application of Certain Chinese Family Benevolent & Dist. Ass'ns,* 19 F.R.D. 97, 99 (N.D. Cal. 1956), the grand jury's subpoena power "must not be so exercised as to impinge upon the prohibition against unlawful searches and seizures."

It may be argued that the fourth amendment applies only to overbroad grand jury subpoenas calling for

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ment. Since we have determined that the judgment of the district court must be reversed on other grounds, we need not attempt, in this case, to delineate the proper boundaries of the grand jury's authority to delegate certain tasks to government agents. Accordingly, we do not decide whether the deputization of the FBI attempted here was improper.

documentary evidence.[2] We do not believe the fourth amendment's application to proceedings before a grand jury is that limited. The rationale for striking down overbroad subpoenas is that general fishing expeditions into the private affairs of witnesses violate the reasonableness requirement of the fourth amendment. Compelling a person to furnish an exemplar of his voice is as much within the scope of the fourth amendment as is compelling him to produce his books and papers.

The Government argues that it is premature to consider these fourth amendment claims because the witnesses' remedy, if any, lies in the exclusion of the evidence at trial if one ultimately ensues. The argument is not persuasive for it appears to be founded on the premise that the grand jury may for its own purposes compel production of evidence in violation of the fourth amendment.

The record shows that the instant grand jury is investigating possible violations of federal criminal statutes relating to gambling and that pursuant to its investigation it has received in evidence voice recordings which were obtained under orders issued by the district court pursuant to 18 U.S.C. § 2518. Since the Government was apparently unable to identify some or all of the voices recorded, the grand jury seeks to obtain voice exemplars from those whom the Government suspects of having participated in the recorded conversations. The interception order is not part of the record nor has it been furnished to appellants. The Government does not claim that the order named Smith or Dionisio or was based on probable cause for belief that either was committing, had committed, or

[2] *See In re Dymo Industries, Inc.*, 300 F. Supp. 532 (N.D. Cal.), *aff'd*, 418 F.2d 500 (9th Cir. 1969), *cert denied*, 397 U.S. 937 (1970).

was about to commit an offense enumerated in 18 U.S.C. § 2516, or that the facilities involved were leased to, listed in the name of, or commonly used by either of them. Thus, we do not reach the question whether compulsion to furnish voice exemplars is the ultimate permissible step in the invasion of someone's privacy authorized by the antecedent interception order and whether the probable cause underlying the order makes such compulsion reasonable. For all that appears, Smith and Dionisio may be persons who were suspected of being the other parties to conversations with individuals whose privacy the Government had obtained the right to invade, thus being persons whose privacy was still constitutionally protected.

We believe the proposition to be clearly established that under the fourth amendment law enforcement officials may not compel the production of physical evidence absent a showing of the reasonableness of the seizure. *Davis* v. *Mississippi,* 394 U.S. 721 (1969); *Boyd* v. *United States,* 116 U.S. 616 (1886). It is evident that the grand jury is seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars.[3] The issue we must decide is thus narrowed to a determination of whether the interposition of the grand jury between the witnesses and the Government eliminates the fourth amendment protection which would otherwise bar the Government's obtaining the evidence.

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[3] We note that the Government in its petition for enforcement described compliance with the grand jury's demand for the exemplars as "essential and necessary to [its] investigation . . . as a standard of comparison in order to determine whether or not [Smith or Dionisio] is the person whose voice was intercepted pursuant to [the court-ordered wiretap]."

The Government and appellants assert that whether the fourth amendment bars the procedure here attempted is really a question of whether probable cause must exist for the compelled production of physical evidence by a grand jury. The fourth amendment, however, not only proscribes the issuance of warrants without probable cause—a proscription not applicable here because no warrant was involved—but also prohibits searches and seizures which are unreasonable. It is the proper application of the standard of reasonableness to seizures in the grand jury context with which we must be concerned.

In *Davis* v. *Mississippi, supra,* the police detained and fingerprinted a large number of Negro youths in their investigation of an alleged rape where the assailant was described only as a Negro youth. The Supreme Court invalidated a conviction deriving from the use of fingerprints so obtained. Ruling that such an investigatory technique constitutes an unreasonable seizure under the fourth amendment, the Court said:

> Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions." 394 U.S. at 726–27.

We think this language applies with equal force to the instant situation. The fourth amendment bans "wholesale intrusions" upon personal security whether such intrusions stem from illegal arrests or from grand jury subpoenas ostensibly issued only because of the Government's bald statement that the witnesses are potential defendants. The fact that the investi-

gation in this case was conducted under the aegis of the grand jury does not excuse its unreasonableness. The dragnet effect here, where approximately twenty persons were subpoenaed for purposes of identification, has the same invidious effect on fourth amendment rights as the practice condemned in *Davis*.

We agree with the Government's observation that the grand jury is not required to have a factual basis for commencing an investigation and can pursue rumors and clues which further investigation may prove groundless. The grand jury does not need probable cause to subpoena witnesses. But that is not to say that the grand jury may misuse its subpoena power to effect a seizure which in other contexts would be violative of the fourth amendment.

We reverse and remand to the district court with directions to vacate its contempt judgments and commitments.

A true Copy:
Teste:

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Clerk.

APPENDIX B

United States Court of Appeals For the Seventh Circuit, Chicago, Illinois 60604

(Monday, June 14, 1971)

Before

Hon. LUTHER M. SKYGERT, Chief Judge
Hon. ROGER J. KILEY, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, CIRCUIT Judge
Hon. OTTO KERNER, Circuit Judge
Hon. WILBUR P. PELL, JR., Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

Nos. 71-1155, 71-1157

[In the Matter of CHARLES BISHOP SMITH and ANTONIO DIONISIO, Witnesses Before the Special February 1971 Grand Jury]

ANTONIO DIONISIO AND CHARLES BISHOP SMITH, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

(On Petition for Rehearing)

On consideration of the appellee's petition for rehearing and suggestion that it be heard *en banc*

and the answers of the appellants filed in the above-entitled cause, a vote of the active members of the court was requested, and a majority of the active members of the court having voted to deny a rehearing and rehearing *en banc.*

IT IS ORDERED that the petition for rehearing and the petition for rehearing *en banc* be, and the same are hereby denied.

Judges Cummings, Stevens and Sprecher voted to grant the petition for rehearing and the petition for rehearing *en banc.*

APPENDIX C

United States District Court, Northern District of Illinois, Eastern Division

In Re Albert Dini, a Witness Before the Special February 1971 Grand Jury

(NO. 71 GJ 466)

MEMORANDUM AND ORDER ON GOVERNMENT'S PETITION TO COMPEL VOICE EXEMPLARS

On behalf of the February 1971 Special Grand Jury, the United States Attorney petitions this court for orders directing certain witnesses to furnish exemplars of their voices. For the reasons stated below, this court is of the opinion the petitions should be granted.

The February 1971 Special Grand Jury is presently investigating possible violations of federal criminal statutes. Each witness who is the subject of these petitions has been called before the grand jury and has been fully advised that he or she is a potential defendant in its investigation. The grand jury has requested that each of these witnesses furnish voice exemplars, and each witness has refused to do so. The grand jury states that it needs these voice exemplars as a standard of comparison in order to identify voices intercepted by agents of the Federal Bureau of Investigation pursuant to orders entered by this court in 70 C 2510 and 70 C 2601. The witnesses here contend that to compel them to furnish such voice exemplars would violate their con-

stitutional rights under the Fourth and Fifth Amendments. This court does not agree.

THE FOURTH AMENDMENT

The witnesses are lawfully before the grand jury pursuant to subpoena. The Fourth Amendment prohibition against unreasonable search and seizure applies only where identifying physical characteristics, such as fingerprints, are obtained as a result of unlawful detention of a suspect, or when an intrusion into the body, such as a blood test, is undertaken without a warrant, absent an emergency situation. *E.g., Davis* v. *Mississippi,* 394 U.S. 721, 724–728 (1969); *Schmerber* v. *California,* 384 U.S. 757, 770–771 (1966). The voice exemplars sought clearly do not fall within the scope of an illegal search and seizure, and to compel these witnesses to furnish such evidence of physical characteristics in order to assist the grand jury does not violate their rights under the Fourth Amendment.

THE FIFTH AMENDMENT

The Fifth Amendment privilege against self-incrimination protects a suspect or accused from being compelled to testify against himself or otherwise provide the government with evidence of a testimonial or communicative nature. *Schmerber* v. *California,* 384 U.S. 757, 761 (1966). Voice Exemplars, just as handwriting exemplars or fingerprints, do not have testimonial or communicative qualities within the meaning of the Fifth Amendment. *Schmerber* v. *California, supra,* at 764. The Supreme Court has ruled that to compel a defendant to repeat certain words allegedly used in the perpretration of a crime for identification purposes does not violate his Fifth Amendment rights. *United States* v. *Wade,* 388 U.S. 218, 222–223 (1967).

See also Higgins v. *Wainwright,* 424 F.2d 177, 178 (5th Cir. 1970); *Schmidt* v. *United States,* 380 F.2d 22, 23 (5th Cir. 1967), *cert. den.* 390 U.S. 908 (1968). This court therefore, concludes that the orders sought do not violate these witnesses' rights against self-incrimination.

ADMISSIBILITY AT TRIAL

Several of the witnesses have raised objections on the grounds that voiceprints obtained from the voice exemplars in question would not be admissible evidence at trial. These objections are premature. The sole question before this court is whether such exemplars may be involuntarily obtained for use by the grand jury to assist them in investigating possible violations of federal law. A witness may not impede the collection of evidence by a grand jury, even if the issues he seeks to raise could later be successfully litigated by an indicted defendant. Whatever remedies are available to these witnesses, should they be indicted, with respect to allegedly tainted or inadmissible evidence do not affect the right of the grand jury to collect the evidence it now seeks. *C.f., United States ex rel. Rosado* v. *Flood,* 394 F.2d 139, 142 (2nd Cir. 1968).

The petitions requested by the United States Attorney on behalf of the September 1971 Special Grand Jury will therefore be granted, and orders will be entered accordingly.

/s/ EDWIN A. ROBSON,
Chief Judge.

FEBRUARY 19, 1971.

APPENDIX D

United States District Court, Northern District of Illinois, Eastern Division

IN RE ANTONIO DIONISIO, A WITNESS BEFORE THE SPECIAL FEBRUARY GRAND JURY

(No. 71 GJ 466)

JUDGEMENT AND COMMITMENT

On motion of WILLIAM J. BAUER, United States Attorney for the Northern District of Illinois, for an order by the Court to enforce its order of February 19, 1971, heretofore entered in the above-entitled matter, the respondent, ANTONIO DIONISIO, appearing before the Court in person and counsel, and said respondent having admitted that he had refused and would continue to refuse to furnish voice exemplars before and to the SPECIAL FEBRUARY 1971 GRAND JURY, or to any duly appointed agent of said Grand Jury, the Court having heard argument of counsel:

IT IS ADJUDGED that respondent, ANTONIO DIONISIO, is in direct and continuing contempt of this Court for his failure to obey the order of this Court, dated February 19, 1971, heretofore entered herein.

IT IS THEREFORE ORDERED that respondent ANTONIO DIONISIO, be and he hereby is committed to the custody of the United States Marshal for

the Northern District of Illinois until such time as said respondent shall obey said order, or until the expiration of eighteen months.

Enter:

/s/ EDWIN A. ROBSON,
Chief Judge.

Dated: February 22, 1971.

APPENDIX E

United States District Court, Northern District of Illinois, Eastern Division

IN RE CHARLES BISHOP SMITH A WITNESS BEFORE THE SPECIAL FEBRUARY GRAND JURY

(No. 71 GJ 465)

JUDGMENT AND COMMITMENT

On motion of WILLIAM J. BAUER, United States Attorney for the Northern District of Illinois, for an order by the Court to enforce its order of February 23, 1971, heretofore entered in the above-entitled matter, the respondent, CHARLES BISHOP SMITH, appearing before the Court in person and with counsel, and said respondent having admitted that he had refused and would continue to refuse to furnish voice exemplars before and to the SPECIAL FEBRUARY 1971 GRAND JURY, or to any duly appointed agent of said Grand Jury, the Court having heard argument of counsel:

IT IS ADJUDGED that respondent, CHARLES BISHOP SMITH, is in direct and continuing contempt of this Court for his failure to obey the order of this Court, dated February 23, 1971, heretofore entered herein.

IT IS THEREFORE ORDERED that respondent, CHARLES BISHOP SMITH, be and he hereby is committed to the custody of the United States Mar-

shal for the Northern District of Illinois until such time as said respondent shall obey said order, or until the expiration of eighteen months.

Enter:

/s/ EDWIN A. ROBSON,
Chief Judge.

U S. GOVERNMENT PRINTING OFFICE: 1971

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FILE COPY

No. 229

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E. ROBERT SEAVER, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA,

Petitioner,

vs.

ANTONIO DIONISIO and CHARLES BISHOP SMITH, WITNESSES BEFORE THE SPECIAL FEBRUARY 1971 GRAND JURY,

Respondents.

On Petition For Writ of Certiorari To the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT, CHARLES BISHOP SMITH, IN OPPOSITION

FRANK G. WHALEN
111 West Washington Street
Chicago, Illinois 60602
Attorney for Charles Bishop Smith

The Scheffer Press, Inc.—ANdover 3-6850

CITATIONS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 229

UNITED STATES OF AMERICA,

Petitioner,

vs.

ANTONIO DIONISIO and CHARLES BISHOP SMITH, WITNESSES BEFORE THE SPECIAL FEBRUARY 1971 GRAND JURY,

Respondents.

On Petition For Writ of Certiorari To the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT, CHARLES BISHOP SMITH, IN OPPOSITION

REASONS FOR DENYING THE WRIT

The Government's petition for writ of certiorari violates the letter and spirit of Supreme Court Rule 19. Petitioner and respondent have only an academic interest in the outcome of this litigation. Petitioner's petition for rehearing was denied in the United States Court of Appeals for the Seventh Circuit on June 14, 1971. Justice Mar-

shall extended the time for the filing of the petition for writ of certiorari up to and including August 13, 1971. Three days prior to the expiration of the latter date, that is, August 10, 1971, respondent was indicted in Case No. 71 CR 788 and charged in fifteen counts with violating Sections 1952 and 1954 of Title 18, United States Code, the exact offenses for which he was subpoenaed and directed to give his voice exemplars to the Grand Jury.

Respondent is not only complaining of the invidious effect that the dragnet procedure has on the Fourth Amendment rights, as found by the Circuit Court of Appeals to be a practice condemned in *Davis* v. *Mississippi*, 394 U.S. 721, (Opinion 17) but is also complaining of the invidious effect that the bringing of an indictment three days before the filing of a petition for certiorari has on respondent's rights under the Fourth Amendment. Respondent is now in two separate courts on the same matter.

The Circuit Court of Appeals found that in the Government's petition for enforcement, the Government described compliance of the Grand Jury's demand for the exemplars as "essential and necessary to its investigation." It is now apparent that the exemplars were neither essential nor necessary. In addition, the Circuit Court of Appeals found (Opinion 16) that the Grand Jury had received in evidence voice recordings which were obtained under orders issued by the District Court pursuant to 18 USC Section 2518, but that "the interception order is no part of the record nor has it been furnished to Appellants." Neither the Court nor respondent is aware of any possible basis upon which the interception order was entered.

The United States Supreme Court has stated that the basic purposes behind the Fifth Amendment relate to preserving the integrity of a judicial system, *Tehan* v. *Shott*,

382 U.S. 406, 415; and that the Fifth Amendment is an expression of the moral striving of the community, *Malloy v. Hogan*, 378 U.S. 1, 9. The basic purposes behind the Fourth Amendment should not be less and the integrity of a judicial system is not enhanced when the Government indicts a citizen three days prior to the filing of a petition for certiorari in the same matter.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

FRANK G. WHALEN
Attorney for Respondent,
Charles Bishop Smith

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-229

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO DIONISIO AND CHARLES BISHOP SMITH

STATEMENT OF DISMISSAL AS TO RESPONDENT SMITH UNDER RULE 60

The grand jury in this case subpoenaed respondents Smith and Dionisio as witnesses to obtain voice exemplars for identification purposes. When they refused to appear, the district court adjudged them guilty of civil contempt. The court of appeals reversed and on August 13, 1971, the government filed a petition for a writ of certiorari.

Since the filing of the petition, the grand jury has indicted respondent Smith and no longer seeks to compel him to appear as a witness. Accordingly, the United States requests dismissal of the petition as to respondent Smith. It continues, however, to seek review of the judgment pertaining to respondent Dionisio.

Counsel for respondent Smith has no objection to this dismissal.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-229

UNITED STATES OF AMERICA,

Petitioner,

vs.

ANTONIO DIONISIO, Witness Before the Special February 1971 Grand Jury

MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The Respondent, Antonio Dionisio, hereby files his memorandum in opposition to a petition for writ of certiorari.

OPINION BELOW

The opinion of the Court of Appeals is reported at 442 F.2d 276 (Petition for Certiorari App. A, pp. 12-19).

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1971. On June 14, 1971 the Court of Appeals denied a petition for rehearing with suggestion for rehear-

ing en banc (Petition for Certiorari App. B, pp. 20-21). On July 8, 1971, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including August 13, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). On December 14, 1971 the Court requested Respondent to file a response to the petition for certiorari on or before January 13, 1972. The time for filing the response to the petition for certiorari was subsequently extended to February 14, 1972.

QUESTION PRESENTED

Does the Fourth Amendment bar the compelling of a grand jury witness to furnish a voice exemplar for comparison with exhibits consisting of recordings of lawfully intercepted wire communications where approximately twenty (20) persons have been subpoenaed to provide exemplars, absent a showing of reasonableness of the request to provide exemplars.

STATEMENT

The Special February 1971 Grand Jury in the Northern District of Illinois is allegedly investigating illegal gambling. It has allegedly received as exhibits voice recordings obtained under court orders, based on warrants issued under 18 U.S.C. (Supp. V) 2518, authorizing interception of wire communications. There has been no determination of the validity of the orders of the interceptions.

The grand jury subpoenaed approximately twenty (20) persons, including respondent Dionisio, and sought to obtain from him voice exemplars for identification purposes. The witness was informed that he was a potential defendant in a matter being investigated by the grand jury. He was asked to examine a transcript of a recording of an authorized intercepted communication and to go to a near-

by room and read the transcript into a telephone connected to a recording device. Dionisio refused to give a voice exemplar, asserting rights under both the Fourth and Fifth Amendments. (Petition for Certiorari App. A, pp. 12-13).

A petition was then filed in the district court seeking orders directing respondent to furnish a voice exemplar for comparison with the recordings. Following a hearing, the district court ordered him to furnish the exemplars. The respondent subsequently refused to do so. The district court adjudged him guilty of civil contempt, and committed him to prison until he obeyed its order or the grand jury term expired (Petition for Certiorari App. D, p. 25).

The Court of Appeals reversed (Petition for Certiorari App. A). It rejected the claim that the grand jury's request for the voice exemplars violated respondent's rights under the Fifth and Sixth Amendments, but concluded that to compel compliance with the request would violate his Fourth Amendment rights. In the Court's view, the grand jury was "seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars" (Petition for Certiorari App. A, p. 17). The Court held that if the Fourth Amendment applied to grand jury proceedings *Hale* v. *Henkel*, 201 U.S. 43 (1906) and that this "seizure" of physical evidence contradicted the "standard of reasonableness" required by the Fourth Amendment, as recently construed in *Davis* v. *Mississippi*, 394 U.S. 721. Equating the grand jury's procedure to the police arrests involved in *Davis*, the Court concluded that "[t]he dragnet effect here, where approximately twenty persons were subpoenaed for purposes of identification, has the same invidious effect on fourth amendment rights as the practice condemned in *Davis*" (id. at p. 19).

ARGUMENT

The position advanced by the petitioner would limit *Hale* v. *Henkel,* 201 U.S. 43 (1906) solely to a determination of reasonableness in a subpoena requiring the production of documentary evidence and would abrogate the effect of the Fourth Amendment to all other seizures. We respectfully submit that Dionisio *does not* establish a blanket rule that all grand jury subpoenaes requiring the production of voice exemplars are subject to motions to quash based upon a lack of showing of reasonableness but limits its effect to those attempts to compel a citizen to furnish such exemplars when there has been no such showing of reasonableness. As has been said many times, each case must rest upon its own special facts. It is apparent in this case, absent a showing to the contrary, that the grand jury was engaged in a "fishing expedition" which had a "dragnet effect" since they subpoenaed twenty persons to give voice exemplars, including the respondent. There is no showing as to why the respondent was included in this large group of persons. Although it is clear from the record that no probable cause existed to arrest the respondent so that other attempts could be made to compel a voice exemplar rather than under the alleged aegis of a grand jury subpoena.

We respectfully submit that the principles of the *Davis* v. *Mississippi,* 394 U.S. 725 apply with equal force to a subpoena, such as that presented in the instant case.

If the opinion of the Court of Appeals in this case is not valid all that would be needed to be done to avoid the principles enunciated in *Davis* by any law enforcement agency would be to subpoena all possible subjects before

a grand jury and compel each of them to provide appropriate exemplars. The basis for the issuance of the subpoena could be as frivolous as any basis which could be imagined by a law enforcement officer and the law enforcement agencies would thereby be able to obtain indirectly what *Davis* prohibits directly. The harassment would be as oppressive and violative of personal rights as the action of police acting without grand jury authority condemned in *Davis*.

Grand juries have two basic, if not contrary, functions. A prime function is to investigate possible offenses, *United States* v. *Johnson*, 319 U.S. 503, on the other hand it stands between the accuser and the accused. *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Hannah* v. *Larche*, 363 U.S. 420, 499 (Douglas, J. dissenting).

The decision here sought to be reviewed merely prohibits the prostitution of a grand jury so it becomes a mere tool of investigative authorities. It does not declare a new constitutional principle, deserving review by this Court, but merely reaffirms and follows what have been the teachings of this Court for over half a century. *Hale* v. *Henkel*, 201 U.S. 43 (1906)

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted

JOHN POWERS CROWLEY
Attorney for Respondent

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-229

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO DIONISIO

No. 71-850

UNITED STATES OF AMERICA, PETITIONER

v.

IN RE SEPTEMBER 1971 GRAND JURY, RICHARD J. MARA, A/K/A RICHARD J. MARASOVICH

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The purpose of this memorandum is to bring to the Court's attention the Second Circuit's recent decision in *United States* v. *Doe* (*Cynthia Schwartz*), No. 663, September Term, 1971, decided March 28, 1972. A copy of that opinion is set forth in the Ap-

462-725 O—72——1

pendix, *infra*. The court in that case affirmed a civil contempt conviction against a grand jury witness for refusing to furnish the grand jury handwriting exemplars. In his opinion for a unanimous court, Chief Judge Friendly rejected the argument that "the use of process to compel the furnishing of handwriting (or voice) exemplars to a grand jury constitutes a search or seizure within the Fourth Amendment which requires a preliminary showing of probable cause to believe that the witness' handwriting (or voice) resembles that of a person whom the Government has probable cause to believe has committed a crime" (Appendix, *infra*, pp. 3a–4a). He further rejected the position that the government must meet "even so apparently modest a requirement as a showing of 'reasonableness' * * *" (*id.* at pp. 9a–10a). In doing so he recognized that "a different view has been taken by the Seventh Circuit" in *Dionisio* and in *Mara*, and expressly declined to follow that court's view on the ground that "neither the reasoning nor the authorities cited [there] are persuasive" (Appendix, *infra*, p. 10a).

As a result, there is now a direct conflict of decisions between the Seventh and the Second Circuits. For this reason and for the reasons stated in the petitions for writs of certiorari in Nos. 71–229 and 71–850, we submit that the petitions should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

APPENDIX

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 663—September Term, 1971.

(Argued March 9, 1972 Decided March 28, 1972.)

Docket No. 72-1209

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN DOE,

In the Matter of the Grand Jury Testimony and Contempt of CYNTHIA B. SCHWARTZ,

Appellant.

Before:

FRIENDLY, *Chief Judge,*
TIMBERS, *Circuit Judge,* and JAMESON, *District Judge.**

Appeal from an order of the District Court for the Southern District of New York, Morris E. Lasker, *Judge,* adjudging appellant guilty of civil contempt for refusal to furnish handwriting exemplars to a grand jury.

Affirmed.

*Of the United States District Court for the District of Montana, sitting by designation.

FRIENDLY, *Chief Judge:*

On January 22, 1972, appellant Cynthia B. Schwartz appeared, pursuant to subpoena, before a grand jury in the Southern District of New York, which was conducting an investigation in regard to possible mail and wire frauds. The Assistant United States Attorney asked her to furnish samples of her writing of the names Cynthia Schwartz, Cynthia B. Brown, Dixbie Management Co., Dixbie Colossal Inc., National Angus of America, and National Beef Corporation. She refused, asserting her privilege against self-incrimination under the Fifth Amendment. On February 2, 1972, Judge Tyler directed her to execute the exemplars and appointed the Legal Aid Society to represent her. After she had again refused, on February 9, she and her counsel appeared before Judge Lasker. Counsel now asserted that the Fourth Amendment required the Government to show the reasonableness of its request. Judge Lasker reserved decision. Prior to another appearance before the judge on February 14, the Assistant, contending that in any event the request for exemplars was reasonable, submitted an affidavit stating that witnesses before the grand jury had indicated there were resemblances between the handwriting on certain exhibits and what they believed to be that of Cynthia B. Schwartz, and that other efforts to obtain specimens of her handwriting had been

unsuccessful. Counsel then took the more advanced position that the Government had the burden of showing "probable cause." On February 14, Judge Lasker directed Mrs. Schwartz to furnish the exemplars. When she again refused, on February 17, the judge cited her for civil contempt and sentenced her for thirty days, unless she sooner furnished the exemplars or the grand jury was discharged. However, he stayed the sentence for a week to permit application to this court for a further stay pending appeal. Another panel extended the stay and set the appeal for argument on March 9. After hearing argument we directed that the stay be vacated at 5:00 P.M. on March 13; this has been extended by the Supreme Court until its further order. We affirm the judgment of the district court.

Although appellant now makes no claim under the Fifth Amendment and relies solely on the Fourth, it is important for the latter purpose to underscore that no basis for a Fifth Amendment claim exists. *Gilbert* v. *California,* 388 U.S. 263, 265-67 (1967), held that the furnishing of handwriting exemplars did not constitute testimony within the protection of the self-incrimination clause. Combination of that holding with *United States* v. *Wade,* 388 U.S. 218, 222-23 (1967), leads inevitably to the conclusion that this is true even when a witness is asked to furnish specimens of his writing of names or words that had been used in the commission of a crime. We so held in *United States* v. *Doe (Devlin),* 405 F.2d 436, 438-39 (2 Cir. 1968). Furthermore, whereas *Gilbert and Wade* had been concerned only with claims that the compelled furnishing of exemplars constituted compulsory self-incrimination and consequent error, *Doe* added the scarcely surprising gloss that, since no privilege existed, refusal to furnish handwriting exemplars justified a moderate sentence for civil contempt.

Appellant's argument is that the use of process to compel the furnishing of handwriting (or voice) exemplars to a

grand jury constitutes a search or seizure within the Fourth Amendment which requires a preliminary showing of probable cause to believe that the witness' handwriting (or voice) resembles that of a person whom the Government has probable cause to believe has committed a crime.[1]

Evaluation of her claim demands inquiry into the scope of the Fourth Amendment's protection and its relationship to and limitations upon the historic exercise of the grand jury's inquisitorial function. Despite appellant's contention that the Fourth Amendment creates a *per se* prohibition against compelled production, absent probable cause, of incriminating evidence not privileged by the Fifth Amendment, and the Government's argument of *per se* inapplicability of the Fourth Amendment to grand jury process except as a limitation upon compelled production too sweeping in scope, neither the language of the Amendment nor the history of its application supports either of these *per se* rules.

The Fourth Amendment, in relevant part, states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." Exemplars, whether handwriting or voice, if covered at all, must be considered elements of "persons" rather than "houses, papers, and effects." Cf. *Schmerber* v. *California*, 384 U.S. 757, 767 (1966). Decisions dealing with "interferences with property relationships or private papers," *Id.* at 767-68, thus are marginally relevant at best. The Court has had relatively little occasion to discuss the extent of the protection given to the person by the Fourth Amendment save in the context of arrests. Perhaps the most useful statement is that of the Chief Justice in *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968), borrow-

1 At least this is our best understanding of what counsel means by "probable cause" in this context; appellant's brief seems to take varying positions on this point.

ing from Mr. Justice Harlan's concurring opinion in *Katz* v. *United States*, 389 U.S. 347, 360 (1967): "[W]herever an individual may harbor a reasonable 'expectation of privacy,' ... he is entitled to be free from unreasonable governmental intrusion." *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968).

It is too plain to demand extended argument that a "reasonable expectation of privacy" does not relieve of the requirement of appearance before a grand jury or other properly constituted tribunal, although this does interfere with an individual's ability to do exactly what he does or does not please. In *United States* v. *Bryan*, 339 U.S. 323, 331 (1950), relating to testimony before a Congressional committee, the Court quoted with approval Dean Wigmore's statement that, "For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence," 7 Wigmore, Evidence (3d ed.) § 2192. Still more pertinently the Court observed in *Blair* v. *United States*, 250 U.S. 273, 280-81 (1919):

> At the foundation of our Federal government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States. . . . [I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned . . . .

No preliminary showing of need or relevancy is required before a person may be subpoenaed to appear before a grand jury. Indeed, the Seventh Circuit, whose decision in *In re Dionisio*, 442 F.2d 276 (1971), constitutes appellant's chief reliance, has recently so held. *Fraser* v. *United States*, 452 F.2d 616 (7 Cir. 1971). Even the fact that the witness

may himself be the subject of the grand jury investigation does not entitle him to refuse to *appear*. See *United States* v. *Scully*, 225 F.2d 113 (2 Cir.), *cert. denied*, 350 U.S. 897 (1955); *United States* v. *Winter*, 348 F.2d 204, 207-08 (2 Cir.), *cert. denied*, 382 U.S. 955 (1955). The distinction between the compulsion exerted by a subpoena and detention by law enforcement officers is far from being a mere matter of words. The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court.

This case thus differs fundamentally from *Davis* v. *Mississippi*, 394 U.S. 721 (1969); *Terry* v. *Ohio, supra;* and *Schmerber* v. *California, supra*, the Supreme Court decisions most strenuously pressed upon us. In each of those cases the Court found a police-citizen encounter which amounted to a "seizure" of the person within the meaning of the Fourth Amendment, although on the facts not an unreasonable one. In *Terry* and *Schmerber* the initial encounters were followed by police practices which themselves constituted "searches," although these were again held to be reasonable—in *Terry*, the pat-down of the suspect's clothing for concealed weapons and in *Schmerber*, the extraction of blood from the suspect's arm. In *Davis* it was the initial detention that was found to violate the Fourth Amendment and thus to invalidate the use at trial of Davis' fingerprints taken while he was unlawfully detained. See *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Here there was no illegality in the compelled appearance.

On the other hand, the fact that compulsory appearance before a grand jury is not a seizure of the person does not lead automatically to the conclusion that nothing the grand jury may require could constitute a search. The test must be whether the requirement invades a "reasonable expectation of privacy." Presumably no one would contend that requiring a grand jury witness to remove a mask, in order to permit comparison with surveillance photographs, constituted a "search"; there is no "reasonable expectation of privacy" about one's face. On the other side of the line, according to *Schmerber*, is a blood test; so perhaps, although we need not decide the point, would be a demand for the display of identifying characteristics such as scars or birthmarks on parts of the body not normally exposed.[2] Handwriting and voice exemplars fall on the side of the line where no reasonable expectation of privacy exists. Except for the rare recluse who chooses to live his life in complete solitude, in our daily lives we constantly speak and write, and while the content of a communication is entitled to Fourth Amendment protection, *Katz* v. *United States*, *supra*, the underlying identifying characteristics—the constant factor throughout both public and private communications—are open for all to see or hear. There is no basis for constructing a wall of privacy against the grand jury which does not exist in casual contacts with strangers. Hence no intrusion into an individual's privacy results from compelled execution of handwriting or voice exemplars; nothing is being exposed to the grand jury that has not previously been exposed to the public at large. When appellant's case is properly analyzed, *Davis* v. *Mississippi* becomes an authority for the Government

2 Some of the examples of more intrusive examination of the body cited in 8 Wigmore, Evidence §2216 at 166-67 n. 3 (McNaughton rev. 1961) would more clearly be protected in the absence of a preliminary showing of need.

rather than against it. For the Court there said that fingerprinting, surely more nearly private than examplars of the voice or handwriting, "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." 394 U.S. at 727.

Appellant argues that to permit the prosecutor to accomplish through use of the grand jury what he might not be able to accomplish without it would subvert the purposes underlying the Fourth Amendment. Aside from the fact, as previously indicated, that the purposes underlying the Fourth Amendment are not offended by what has here been requested, her argument overlooks an important aspect of the grand jury's function—that of acting as a protective buffer between the accused and the prosecutor. The grand jury was regarded by the founders, not as an instrument of oppression but as a safeguard of liberty so important as to be preserved in the Fifth Amendment. In *Ex parte Bain*, 121 U.S. 1, 10-11 (1887), Mr. Justice Miller quoted with approval from a charge given by Mr. Justice Field, 2 Sawyer 667:

> And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which gave to it its chief value in England,

> and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan or private enmity.

In *Stirone* v. *United States*, 361 U.S. 212, 218 (1960), Mr. Justice Black said that

> The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of fellow citizens acting independently of either prosecuting attorney or judge.

In order for the grand jury to function, it must have the cooperation of citizens in producing evidence, and of doing that quickly, subject, of course, to the limits imposed by the Fifth Amendment privilege. The safeguards built into the grand jury system, such as enforced secrecy and use of court process rather than the constable's intruding hand as a means of gathering evidence, severely limit the intrusions into personal security which are likely to occur outside the grand jury process. To be sure, on occasion, a grand jury may overstep bounds of propriety either at its own or the prosecutor's instance, and conduct an investigation so sweeping in scope and undiscriminating in character as to offend other basic constitutional precepts. When this occurs courts are not without power to act, *see, e.g., Hale* v. *Henkel*, 201 U.S. 43, 65 (1906); *Blair* v. *United States, supra*, 250 U.S. at 281. But there is no indication that anything of the kind was involved here. Apart from such cases, when the grand jury has engaged in neither a seizure nor a search, there is no justification for a court's imposing even so apparently modest a requirement as a showing of "reasonable-

ness"—with the delay in the functioning of the grand jury which that would inevitably entail.

We recognize that a different view has been taken by the Seventh Circuit in *In re Dionisio, supra,* 442 F.2d 276 which was followed in *In re Mara,* No. 71-1740 (7 Cir. December 1, 1971). With respect, neither the reasoning nor the authorities cited are persuasive to us. The court stated that "compelling a person to furnish an exemplar of his voice is as much within the scope of the Fourth Amendment as is compelling him to produce his books and papers." 442 F.2d at 279. But, aside from the fact that, as already pointed out, those decisions involving "interferences with property relationships or private papers," *Schmerber* v. *California, supra,* 384 U.S. at 767, are marginally relevant at best, the Fourth Amendment has not been held to forbid compulsory production of books and papers before a grand jury save in two types of situations: One is stated in *Boyd* v. *United States,* 116 U.S. 616 (1886), where the majority, over the dissent of Mr. Justice Miller and Chief Justice Waite, held that compulsory production of incriminating documents before a grand jury violated not only the self-incrimination clause of the Fifth Amendment, as all the Justices agreed, but the Fourth as well. While Dean Wigmore believed that "the Supreme Court has to a large extent recanted that part of the Boyd dicta which would apply the Fourth Amendment to an order to produce a document, properly a Fifth Amendment concern," 8 Wigmore, Evidence §2264, at 381-84, n. 4 (McNaughton rev. 1961), we need not consider this, since, as developed at the outset, Mrs. Schwartz was not directed to produce anything that was testimonial in nature. The other situation is reflected in the statement in *Hale* v. *Henkel, supra,* 201 U.S. at 76, that a grand jury subpoena duces tecum too sweeping in its terms "may constitute an unreasonable search and seizure within the Fourth Amendment." We note that in *Oklahoma Press Publishing Co.* v.

Walling, 327 U.S. 186, 208 (1941), the Court in referring to the problem, spoke of "the Fourth [Amendment], if applicable," which might mean that protection against too sweeping subpoenas was furnished rather by the due process clause. This likewise need not be considered, since no issue of unreasonable scope was here presented. The authorities relied upon in *Dionisio* were *Boyd* v. *United States, supra; Hale* v. *Henkel, supra;* and *Davis* v. *Mississippi, supra.* As previously indicated, we do not believe that those cases lead to the result the court reached; indeed, as indicated, we believe *Davis* v. *Mississippi* points exactly the other way.

While the Eighth Circuit has also recently held that a demand by law enforcement officers for handwriting exemplars is subject to the Fourth Amendment, though under a standard of less than probable cause for an arrest, *United States* v. *Harris* and *United States* v. *Long*, Nos. 71-1220-21 (8 Cir. January 12, 1972), those cases dealt with action by police—in one instance in the defendant's home, in the other while he was under arrest—not pursuant to a subpoena before a grand jury. While the Eighth Circuit concluded that, in addition to the police-citizen encounter being a seizure, the taking of a handwriting exemplar was itself a search, we find the court's reasoning unconvincing on this point. In support of its conclusion the court in *Harris* pointed to proposed new Rule 41.1, Nontestimonial Identification, of the Federal Rules of Criminal Procedure. See Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 52 F.R.D. 409, 462 (1971). As the Advisory Committee Note following the rule indicates, this proposed rule "provides a procedure by which a federal magistrate may issue an order authorizing a nontestimonial identification procedure" by law enforcement officers. 52 F.R.D. at 467. The proposed rule specifically takes account of the decision in *Davis* v. *Missis-*

sippi, supra, with respect to the fruits of unlawful detention and, in accordance with a suggestion in that opinion, provides for nontestimonial compulsory identification before law enforcement officers on a showing less than the probable cause required to make an arrest. Neither the proposed rule nor the Advisory Committee Note implies that the Government must make a preliminary showing before a grand jury witness can be required to give a moderate number of handwriting exemplars. The Advisory Committee Note, in fact, makes reference to our decision in *United States* v. *Doe (Devlin), supra,* 405 F.2d 436, and states: "Compelling a suspect to submit to a nontestimonial identification procedure has been sustained when it is accomplished by means of a grand jury subpoena." 52 F.R.D. at 469. We find nothing inconsistent with our holding today in the proposed rule which merely recognizes the applicability of the Fourth Amendment to nontestimonial identification procedures when the initial police-citizen encounter places this within the protection of that Amendment.

If, contrary to our view, any showing is needed before a grand jury witness may be required to furnish handwriting exemplars, the test cannot be so severe as appellant urges. A determination that there are sufficient grounds for believing a crime has been committed and that the defendant has committed it to require him to stand trial, is the end result of a grand jury's investigation in cases where it returns a true bill. The Government can no more be required to meet that test with respect to a witness at a preliminary stage in that investigation than it would before calling a witness at the trial itself. All this was clearly recognized in *Hale* v. *Henkel, supra,* 201 U.S. at 65, and in *Blair* v. *United States, supra,* 250 U.S. at 282. Indeed, there may well be instances where the Government's purpose in seeking handwriting exemplars is not to show that the witness

has committed a crime but rather to show that he has not, e.g., when the true suspect says that incriminating writings were the work of the witness rather than himself.[3] Moreover, we have recently observed that the grand jury's scope of inquiry "is not limited to events which may themselves result in criminal prosecution, but is properly concerned with any evidence which may afford valuable leads for investigation of suspected criminal activity during the limitations period." *United States* v. *Cohn*, 452 F.2d 881, 883 (2 Cir. 1971). The Seventh Circuit has recognized that when a court order is involved, the test is merely one of "reasonableness." See *In re Mara, supra*, fn. 3. The prosecutor's affidavit that witnesses before the grand jury had indicated resemblances between Cynthia Schwartz' handwriting and material pieces of evidence in the grand jury's fraud investigation, and that definitive exemplars of her handwriting could not be otherwise obtained, would suffice to meet whatever slight burden of making a preliminary showing the Government might have under any view. However, for the reasons previously given, we hold that, with respect to a reasonable number of handwriting exemplars of a grand jury witness, it has none.

Affirmed.

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3 While normally such a witness would happily comply, cases are not unknown where an innocent third party has accepted "suggestions" that he "take the rap."

INDEX

CITATIONS

473-197—72——1

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71–229

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO DIONISIO, WITNESS
BEFORE THE SPECIAL FEBRUARY 1971 GRAND JURY

No. 71–850

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD J. MARA, WITNESS
BEFORE THE SPECIAL SEPTEMBER 1971 GRAND JURY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in No. 71–229 (Dionisio Pet. App. A 12–19) is reported at 442 F. 2d 276. The opinion of the district court in No. 71–229 (Dionisio Pet. App. C 22–24) is not reported.

The opinion of the court of appeals in No. 71-850 (Mara Pet. App. A 9-17) is reported at 454 F. 2d 580. The order of the district court in No. 71-850 (Mara Pet. App. B 18-19) was entered without an opinion and is not reported.

JURISDICTION

The judgment of the court of appeals in No. 71-229 was entered on March 25, 1971. On June 14, 1971, the court of appeals denied a petition for rehearing with suggestion for rehearing *en banc*. On July 8, 1971, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to August 13, 1971, and the petition was filed on that date; it was granted on May 30, 1972.

The judgment of the court of appeals in No. 71-850 was entered on December 1, 1971. The petition for a writ of certiorari was filed on December 30, 1971; it was granted on May 30, 1972.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Fourth Amendment bars a grand jury that is investigating illegal activity from compelling a witness, without first showing that the request is "reasonable," to furnish a voice exemplar for comparison with exhibits consisting of records of lawfully intercepted wire communications, or to provide handwriting and printing exemplars for comparison with other writings before the grand jury.

2. If so, whether the preliminary showing needed to satisfy Fourth Amendment standards must be made in an open, adversary hearing.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT

No. 71-229—*Dionisio*

The Special February 1971 Grand Jury was convened in the Northern District of Illinois for the purpose of investigating illegal gambling operations in and around the City of Chicago. During its investigation, it received as exhibits voice recordings obtained under court orders, based on warrants issued under 18 U.S.C. 2518 authorizing the interception of wire communications.

The grand jury then subpoenaed approximately twenty persons, including respondent Dionisio, and sought to obtain from them voice exemplars for identification purposes. Each witness was informed that he was a potential defendant in a matter under investigation by the grand jury. The witnesses were instructed to examine a transcript of an authorized recording of an intercepted communication, and to go to a nearby room and read the transcript into a telephone that was connected to a recording device.[1]

[1] The witnesses were to give the exemplars outside the grand jury room, so that they could have their lawyers present. Each witness was to accompany an FBI agent, who had been appointed as an agent of the grand jury by its foreman, to a telephone located in one of the offices of the United States Attorney. No objections were made to the location of the telephone or recording device.

Dionisio and other witnesses [2] refused to follow those instructions, asserting that the compelled disclosure of a voice exemplar before a grand jury violated rights guaranteed under the Fourth and Fifth Amendments (D. App. 9–10).[3]

The government then filed in the United States District Court for the Northern District of Illinois separate petitions to compel Dionisio and other witnesses to furnish voice exemplars to the grand jury. The petitions stated (D. App. 4–5) that the exemplars were "essential and necessary" to the grand jury investigation, and that they would "be used solely as a standard of comparison in order to determine whether or not the witness is the person whose voice was intercepted * * *." Following a hearing, the district court rejected the various constitutional arguments of the witnesses and ordered that they provide the exemplars in compliance with the grand jury subpoenas (Dionisio Pet. App. C 22–24). When Dionisio persisted in his refusal to give a voice exemplar, the district court on February 22, 1972, adjudged him in civil contempt and committed him to prison until he obeyed the court order or until the term of the Spe-

[2] One of the witnesses who refused to give a voice exemplar was Charles Bishop Smith. He was originally listed with Dionisio as a respondent in this case; the petition was, however, dismissed as to him by the government in October 1971, after he had been indicted by the grand jury.

[3] "D. App." references are to the joint Appendix in No. 71-229, on file with the Clerk of this Court.

cial February 1971 Grand Jury expired (D. App. 14–16, 18).[4]

The court of appeals reversed (Dionisio Pet. App. A 12–19). It rejected the contentions that the grand jury's request for voice exemplars violated rights under the Fifth and Sixth Amendments (Dionisio Pet. App. A 14), but it concluded that to compel compliance with the request would violate Fourth Amendment rights. In the court's view the grand jury was "seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars" (Dionisio Pet. App. A 17). It therefore held that this "seizure" of physical evidence violated the "standard of reasonableness" required by the Fourth Amendment, under *Davis* v. *Mississippi*, 394 U.S. 721. Equating the procedure followed by the grand jury in this case to the police arrests involved in *Davis*, the court stated (Dionisio Pet. App. A 18–19): "The dragnet effect here, where approximately twenty persons were subpoenaed for purposes of identification, has the same invidious effect on fourth amendment rights as the practice condemned in *Davis*."

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[4] The life of the special grand jury involved here is 18 months, but it may be extended an additional 18 months under 18 U.S.C. 3331/2(a). On July 17, 1972, the life of the Special February 1971 Grand Jury was extended for an additional six months.

The Special September 1971 Grand Jury was convened in the Northern District of Illinois for the purpose of investigating thefts of interstate shipments that were taking place in that part of the state. During its investigation, it received as exhibits certain writings which were relevant to the offenses under consideration.

The grand jury then subpoenaed respondent Mara and sought to obtain from him handwriting and printing exemplars for comparison with these exhibits. Mara appeared before the grand jury on September 23 and 28, 1971. He was each time informed that he was a potential defendant in the matter being investigated, and was then directed to furnish the exemplars. On both occasions, he refused to do so.

The government then filed in the United States District Court for the Northern District of Illinois a petition to compel Mara to furnish handwriting and printing exemplars to the grand jury. The petition stated that the exemplars were "essential and necessary" to the grand jury's investigation (M. App. 3);[3] it was accompanied by an affidavit of an FBI agent, submitted *in camera,* which set forth the basis for seeking the exemplars from Mara. The district court ordered Mara to provide the exemplars (Mara Pet. App. B 18–19). When he continued to refuse to do so, he was adjudged to be in civil contempt and committed to prison until he obeyed the court order

[3] "M. App." references are to the Supreme Court Appendix in No. 71–850 on file with the Clerk of this Court.

or until the term of Special September 1971 Grand Jury expired (Mara Pet. App. C 20–21).[6]

The court of appeals reversed (Mara Pet. App. A 9–17). Relying on its earlier opinion in *Dionisio, supra*, it held (*id.* at 10–11) that "compelling * * * [a grand jury witness] to furnish exemplars of his handwriting and printing is forbidden by the Fourth Amendment unless the Government has complied with its [the Fourth Amendment's] reasonableness requirement * * *."

The court then turned to "the procedure the Government must follow in attempting to demonstrate that the proposed seizure of the exemplars is reasonable" and "the content of the reasonableness showing necessary" (*id.* at 11). It rejected the *in camera* procedure used in the district court, and ruled that "the Government must show reasonableness by presenting its affidavit [or other proof] in open court in order that * * * [the witness] may contest its sufficiency" (*ibid.*). With regard to "[t]he substantive showing that the Government must make," the court held (*id.* at 15–16) that proof was required "that the grand jury investigation was properly authorized * * * that the information sought is relevant to the inquiry, and that * * * the grand jury process is not being abused." In addition, it stated (*id.* at 16) that in these circumstances the government must demonstrate "why satisfactory * * * exemplars cannot be obtained from other sources without grand

[6] The court of appeals released Mara on bail pending his appeal to that court (Mara Pet. App. D 22–23).

jury compulsion"; it is, the court concluded (*ibid.*), "an abuse of the grand jury process for the Government to impose on that body to perform investigative work that can be, and heretofore has been, successfully accomplished by the regular investigative agencies of Government."

The affidavit of the FBI agent that was before the district court was considered by the court of appeals to lack sufficient detail to establish the necessary connection between the identification evidence sought and the purpose to be served (*ibid.*).

SUMMARY OF ARGUMENT

It is well settled that the taking of voice and handwriting exemplars from an individual does not require him to produce evidence of a testimonial nature and therefore does not violate the Fifth Amendment privilege against self-incrimination. Our position in these cases is that the obtaining of similar evidence through the grand jury subpoena process also does not amount to the type of governmental intrusion on individual privacy against which the Fourth Amendment affords protection.

A person's voice and handwriting, much the same as his facial features, are merely identifying physical characteristics which are constantly exposed to public observation. They are not personal characteristics that an individual "seeks to preserve as private" (*Katz* v. *United States,* 389 U.S. 347, 351), or with respect to which he can claim a reasonable "expectation of privacy" (*Terry* v. *Ohio,* 392 U.S. 1, 9). Hence, requir-

ing a grand jury witness to submit to a voice test or to furnish a handwriting specimen does not constitute an unreasonable search or seizure in violation of the Fourth Amendment. There is no intrusion into the body; the witness' private life is not in any way invaded; nor is there involved any disclosure of personal thoughts, opinions or privately-held information.

Moreover, the fact that here the voice and handwriting exemplars were sought through the grand jury process gives rise to no Fourth Amendment claim. It has long been recognized that the calling of a person before a grand jury does not constitute a seizure of the person, as does, for example, a police detention. Every citizen has a duty to appear and give evidence when properly summoned. The fact that the performance of this duty might cause some inconvenience or result in a marginal interference with an individual's private life plainly does not excuse him from complying with a grand jury subpoena on Fourth Amendment grounds.

This is not to say that the constitution affords no protection against a clear abuse of the grand jury process, such as where a subpoena is issued that is too sweeping in scope and undiscriminating in character. But that is not the situation in these cases. Here all that was requested was specific exemplar evidence for comparison with designated material already in the grand jury's possession; it was sought solely for identification purposes. Such a request does not run afoul of the Fourth Amendment.

The court below therefore erred in holding that, before grand jury witnesses can be required to furnish specimens of their voice and handwriting, the government must make a preliminary showing of "reasonableness" in an open, adversary proceeding. This Court has repeatedly declined to permit such litigious interruptions of the grand jury process. To impose such a requirement here on the basis of so tenuous a claim of privacy as these respondents have raised would provide virtually every grand jury witness with an opportunity to impede the investigative process any time he is subpoenaed to testify or to bring in books and records, for his very appearance necessarily involves some interference with his private life. The Fourth Amendment does not demand or authorize judicial scrutiny of this sort.

Even assuming *arguendo,* however, that some preliminary showing of "reasonableness" must be made before grand jury subpoenas seeking exemplar evidence can be enforced, the court of appeals erred in requiring that the government must meet its burden in an open, adversary proceeding. It is our submission that the government should be permitted to show that such a grand jury request satisfies Fourth Amendment standards in an *ex parte, in camera* proceeding before an independent magistrate, as is the customary procedure in analogous Fourth Amendment situations where a search warrant or an arrest warrant is sought.

ARGUMENT

I

INTRODUCTION

The central question before the Court in these two cases relates solely to the Fourth Amendment right of witnesses before a grand jury to withhold from that investigative body exemplar evidence sought purely for identification purposes. While an additional objection to providing the grand jury with exemplars was made in both cases under the Fifth Amendment, that contention was rejected by the court of appeals.[7] Since the Fifth Amendment ruling of the court below bears directly on the formulation of the Fourth Amendment issue to be decided here, we refer at the outset to that aspect of these cases.

This Court's holding in *Gilbert* v. *California,* 388 U.S. 263, makes it clear that the taking under compulsion of exemplar evidence of the sort involved here does not violate the privilege against self-incrimination. *Gilbert* involved handwriting exemplars taken by an FBI agent from an accused in custody and admitted into evidence at trial. The Court there stated (388 U.S. at 266–267): "One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication

[7] See Dionisio Pet. App. A 14, and Mara Pet. App. A 10, n. 1. Similarly, the court below rejected respondents' arguments premised on a right to counsel under the Sixth Amendment.

within the cover of the [Fifth Amendment] privilege. A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection."

The same point was made in *United States* v. *Wade*, 388 U.S. 218, where the Court ruled that it was proper to compel a defendant in a lineup, who was in custody under an indictment for bank robbery, to speak the words allegedly uttered by the robber during the holdup.[8] Rejecting the contention that such a lineup procedure violated the privilege against self-incrimination, the Court stated in *Wade, supra,* 388 U.S. at 222–223: "It is compulsion of the accused to exhibit characteristics, not compulsion to disclose any knowledge he might have. * * * [C]ompelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt."

The *Gilbert* and *Wade* decisions thus lay to rest any claim that the obtaining of exemplars, whether they be handwriting or voice, by compulsory process in some way implicates the Fifth Amendment. And see *Schmerber* v. *California,* 384 U.S. 757, 764; cf.

[8] The Court held that because the lineup was conducted without notice to, and outside the presence of, the accused's attorney, the accused was deprived of his Sixth Amendment right to counsel.

Kirby v. *Illinois*, No. 70–5061, decided June 7, 1972.[9] Given this, the court of appeals' equation of the handwriting and voice exemplars involved here with private books and papers (Dionisio Pet. App. A 16) for the purpose of resolving the present Fourth Amendment issue misconceives the essential nature of the question now before the Court. For, whatever "light" the Self-Incrimination Clause might in other contexts throw "on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment" (*Boyd* v. *United States*, 116 U.S. 616, 633),[10] in the present context Fifth Amendment considerations do not come into play. See *United States* v. *Doe*, 457 F. 2d 895, 897 (C.A. 2), pending on petition for certiorari, No. 71–6522. At issue here is whether a grand jury subpoena to produce exemplars of the variety considered in *Gilbert* and *Wade* is the kind of governmental intrusion on privacy against which the Fourth Amendment alone affords protection, there being no violation of the Self-Incrimination Clause. For the reasons set forth below, we think not.

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[9] The courts of appeals agree. See, *e.g.*, *United States* v. *Doe* (*Devlin*), 405 F. 2d 436, 438–439 (C.A. 2); *United States* v. *Webster*, 422 F. 2d 290 (C.A. 4); *Newsom* v. *United States*, 402 F. 2d 835, 836 (C.A. 5); *Fraser* v. *United States*, 452 F. 2d 616, 619 n. 5 (C.A. 7); *Abernathy* v. *United States*, 402 F. 2d 582, 584–585 (C.A. 8); *Gregory* v. *United States*, 391 F. 2d 281 (C.A. 9), certiorari denied, 393 U.S. 870; *Green* v. *United States*, 386 F. 2d 953, 956–957 (C.A. 10).

[10] We note in passing that it has been observed that "[t]he Supreme Court has to a large extent recanted that part of the *Boyd* dicta which would apply the Fourth Amendment to an order to produce a document, properly a Fifth Amendment concern." 8 Wigmore, *Evidence* § 2264, at 381–384, n. 4 (McNaughton rev. 1961).

II

THE GRAND JURY'S USE OF ITS SUBPOENA POWER TO COMPEL WITNESSES TO APPEAR AND FURNISH VOICE AND HANDWRITING EXEMPLARS FOR PURPOSES OF IDENTIFICATION DOES NOT VIOLATE THE FOURTH AMENDMENT

A. THE FOURTH AMENDMENT PROTECTION

The Fourth Amendment guarantees that all people shall "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * *." Its essential purpose is to protect individual privacy. As stated in *Terry* v. *Ohio, supra,* 392 U.S. at 9, "wherever an individual may harbor a reasonable 'expectation of privacy', * * * he is entitled to be free from unreasonable governmental intrusion." The nature of the protected right was explained in *Katz* v. *United States, supra,* 389 U.S. at 351, as follows:

> * * * the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. * * * But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. * * *

It is our position that voice and handwriting exemplars may be taken from individuals by compulsory process without invading any reasonable expectation of privacy. The tone and manner of one's speech and the way in which a person signs his name are identifying physical characteristics that are "constantly exposed to public observation" (*People* v.

Ellis, 65 Cal. 2d 529, 535 (Cal. Sup. Ct.; Traynor, C.J.)). By their very nature, they are no more private to the individual than his facial features or identifying marks on his body, such as scars or birthmarks, that normally remain in plain view. As the Second Circuit recently stated in *United States* v. *Doe*, *supra*, 457 F. 2d at 898: "Except for the rare recluse who chooses to live his life in complete solitude, in our daily lives we constantly speak and write, and while the content of a communication is entitled to Fourth Amendment protection, *Katz* v. *United States*, *supra*, the underlying identifying characteristics—the constant factor throughout both public and private communications—are open for all to see or hear." [11]

Precisely because these identifying characteristics are on constant public display, compelling an individual by grand jury subpoena to furnish voice or handwriting specimens involves, we submit, no invasion of the privacy of his "person." [12] Unlike the blood sample involved in *Schmerber* v. *California*, *supra*,

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[11] This Court's recent decision in *United States* v. *United States District Court for the Eastern District of Michigan*, No. 70-153, decided June 19, 1972, was of course concerned with Fourth Amendment considerations relating to the content of speech; the Fourth Amendment issue in these cases relating to voice and handwriting exemplars sought solely for identification purposes was not involved there.

[12] We agree with the Second Circuit that "[e]xemplars, whether handwriting or voice, if covered at all [by the Fourth Amendment], must be considered elements of 'persons' rather than 'houses, papers and effects.'" *United States* v. *Doe*, *supra*, 457 F. 2d at 897.

for example, the exemplars sought here contemplate no "intrusions into the body" (384 U.S. at 768). Moreover, as this Court observed in a somewhat related context involving fingerprinting, there is "none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Davis* v. *Mississippi*, 394 U.S. 721, 727. Nor are these respondents being subjected to the "severe, though brief, intrusion upon cherished personal security" and the "annoying, frightening, and perhaps humiliating experience" involved in even a limited police search (*Terry* v. *Ohio*, *supra*, 392 U.S. at 24–25).

The voice test to which the grand jury has required Dionisio to submit for comparison with recordings of lawful court-ordered wiretaps, and the handwriting exemplars sought from Mara for comparison with other writings properly before the grand jury, are no more repugnant to the Fourth Amendment than is the "requiring [of] a grand jury witness to remove a mask, in order to permit comparison with surveillance photographs * * *" (*United States* v. *Doe*, *supra*, 457 F. 2d at 898). In none of these situations does the compelled disclosure of identifying physical characteristics invade a "reasonable expectation of privacy" in the *Terry* or *Katz* sense. Indeed, this is the clear implication of this Court's decisions in *Gilbert* and *Wade* (see pp. 11–13, *supra*). The fact that the defendants in those cases were lawfully in custody does not change the nature of the right involved. To the contrary, if nontestimonial exemplars can be compelled from a person charged with a

crime, there is no reason why the same identifying evidence cannot be demanded from one not yet charged in any sense, but only suspected of being involved in the matters under grand jury investigation—a suspicion, we add, which could well be dissipated by the exemplars sought.[13] "There is no basis," as the Second Circuit observed in *United States* v. *Doe, supra,* 457 F. 2d at 898–899, "for constructing a wall of privacy against the grand jury which does not exist in casual contacts with strangers."

B. THE GRAND JURY SUBPOENA PROCESS

The fact that one's voice and handwriting are not themselves within the area of protected privacy that is sheltered from unreasonable government intrusions does not end the inquiry. For if the effort to obtain exemplars of those identifying physical characteristics is conducted in a manner that otherwise improperly invades "a reasonable expectation of privacy," whether it be an impermissible interference with person (see *Davis* v. *Mississippi, supra*) or

[13] As the Second Circuit noted in *United States* v. *Doe, supra,* 457 F. 2d at 901, "there may well be instances where the Government's purpose in seeking handwriting exemplars is not to show that the witness has committed a crime but rather to show that he has not, *e.g.*, when the true suspect says that incriminating writings were the work of the witness rather than himself." In such instances, the court of appeals pointed out (*id.* at 901, n. 3), "[w]hile normally such a witness would happily comply, cases are not unknown where an innocent third party has accepted 'suggestions' that he 'take the rap.'"

property (see *Hale* v. *Henkel*, 201 U.S. 43), then compelling the production of such "tainted" evidence still might run afoul of the Fourth Amendment. But such, we submit, is not the situation here.

In both of these cases, the exemplars were sought from the respondents by a grand jury subpoena that requested only the identification evidence now under consideration. The court below, placing heavy reliance on *Davis* v. *Mississippi, supra*, equated the compulsory process used here with the detention procedure that this Court found in *Davis* to violate the Fourth Amendment and thus to invalidate the use at trial of Davis' fingerprints taken while he was unlawfully detained (see Dionisio Pet. App. A 18–19).[14] But this analysis misconceives the traditional nature and function of grand juries in this country. As pointed out in *United States* v. *Doe, supra*, 457 F. 2d at 898:

> The distinction between the compulsion exerted by a subpoena and detention by law enforcement officers is far from being a mere matter of words. The latter is abrupt, is effected with force or the threat of it and often in de-

[14] The fingerprints involved in *Davis* were obtained during an extended involuntary detention of 24 youths taken into custody in a ten-day period in connection with a police investigation of a rape. In holding such police procedures to violate the Fourth Amendment, the Court stated (394 U.S. at 728): "We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest." And see *United States* v. *Greene*, 429 F. 2d 193, 197, n. 7 (C.A. D.C.).

> meaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court.

The calling of a person before a grand jury, moreover, does not constitute a seizure of the person, as does police detention. Compare *Davis* v. *Mississippi*, *supra*, 394 U.S. at 726–727; *Terry* v. *Ohio*, *supra*. It long has been recognized that appearing and giving evidence before a grand jury "are public duties which every person * * * is bound to perform upon being properly summoned." *Blair* v. *United States*, 250 U.S. 273, 281; *United States* v. *Bryan*, 339 U.S. 323, 331; and see *Kastigar* v. *United States*, No. 70–117, decided May 22, 1972. The right of each citizen to "a reasonable expectation of privacy" does not excuse him from these obligations, notwithstanding that it may "interfere with [his] ability to do exactly what he does or does not please." *United States* v. *Doe*, *supra*, 457 F. 2d at 897. And this is so even if he is himself suspected of committing the offenses under investigation. See *e.g.*, *Cobbledick* v. *United States*, 309 U.S. 323, 325; *United States* v. *Winter*, 348 F. 2d 204, 207–208 (C.A. 2), certiorari denied, 382 U.S. 955.

As this Court recently stated in *Branzburg* v. *Hayes*, No. 70–85, decided June 29, 1972, slip op. 16: "Citizens generally are not constitutionally immune from grand jury subpoenas." Just as *Branzburg* con-

firmed that there is no privilege in the First Amendment relieving newsmen from the long standing duties to attend and testify, so too we believe that the Fourth Amendment provides no such haven for these respondents. As the court below correctly pointed out in *Fraser* v. *United States,* 452 F. 2d 616, 620: "A grand jury subpoena to testify is not that kind of governmental intrusion on privacy against which the Fourth Amendment affords protection, once the Fifth Amendment is satisfied." [15]

To be sure, this Court observed in *Hale* v. *Henkel,* 201 U.S. 43, 76, that a grand jury subpoena *duces tecum*—requiring the production of documentary evidence of a testimonial nature—which by its terms sweeps too broadly "may constitute an unreasonable search and seizure within the Fourth Amendment." There, however, the Fourth Amendment violation derived essentially from the Court's reluctance to compel a wholesale disclosure of private thoughts and opinions, which is condemned by the Fifth Amendment. And it was even suggested in that case (201 U.S. at 73) that the result might well have been different if, as here, the subpoena had posed no threat to the privilege against self-incrimination. And see *Oklahoma Press Publishing Company* v. *Walling,* 327 U.S. 186, 196, 202–208; *United States* v. *Doe, supra,* 457 F. 2d at 900.

In any event, the grand jury subpoenas involved in these cases do not suffer from overbreadth, whatever

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[15] As we pointed out earlier (*supra*, pp. 11–13), Fifth Amendment considerations are not involved in these cases.

might be the constitutional infirmity resulting therefrom. As we earlier stated, each called only for production of specific exemplar evidence for comparison with lawfully obtained recordings (*Dionisio*) and writings (*Mara*) already in the grand jury's possession. The court below labelled such requests, "general fishing expeditions into the private affairs of witnesses" (Dionisio Pet. App. A 16). But that characterization is accurate only in the sense that every grand jury proceeding is a "general fishing expedition," as a result of that body's broad mission to ferret out the facts without knowing in advance what is involved or where its investigation will lead. This Court recently so stated in *Branzburg* v. *Hayes*, *supra*, slip op. 21–22:

> Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, [the grand jury's] investigative powers are necessarily broad. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair* v. *United States*, 250 U.S. 273, 282. Hence the grand jury's authority to subpoena witnesses is not only historic * * * but essential to its task.

The issuance of these narrowly-drawn subpoenas was a proper exercise of this broad investigative authority. It is the essence of the grand jury proceeding

to question and obtain evidence from a witness in circumstances that would not permit detaining him under the traditional probable cause standard. In this respect, of course, the grand jury's powers exceed those of most investigatory bodies, including the police; but this is necessarily so in view of the fact that the ultimate purpose of the grand jury is to determine if probable cause exists. See *Hale* v. *Henkel, supra,* 201 U.S. at 65; *Hendricks* v. *United States,* 223 U.S. 178, 184. Hence, the absence of probable cause is to be expected, and does not make unreasonable the action ordering the exemplars here.

We disagree with the court below (Dionisio Pet. App. A 19) that the fact that the *Dionisio* grand jury subpoenaed approximately twenty persons to furnish voice exemplars is cause for complaint. Given the nature of the illicit gambling business, it is not unlikely that many people were involved in the matter under investigation. Whether the grand jury was seeking to identify a number of voices, or had called twenty people in an effort to identify one voice, is not shown in the record. Whichever is the case, however, the number of people involved is not, by itself, determinative here.

Insofar as a right of privacy can be founded on the Fourth Amendment, it is a personal right, and turns on the oppressiveness of the action complained of to the individual. *Alderman* v. *United States,* 394 U.S. 165, 174; *Wong Sun* v. *United States,* 371 U.S. 471. If Dionisio or Mara had been repeatedly ordered to appear before a grand jury and give voice or handwrit-

ing exemplars, that might involve undue oppression that would warrant constitutional protection. See *Branzburg* v. *Hayes, supra,* slip op. 1–3 (Powell, J., concurring). But nothing of the sort happened in these cases; each respondent was asked only to give a single exemplar at a reasonable time and place. The Fourth Amendment plainly does not relieve them of their duty to do so (see pp. 19–20, *supra*) simply because the grand jury also subpoenaed similar evidence from other individuals.

III

THE COURT BELOW ERRED IN HOLDING THAT THE FOURTH AMENDMENT REQUIRES IN THE PRESENT CIRCUMSTANCES THAT THE GOVERNMENT MAKE A PRELIMINARY SHOWING OF "REASONABLENESS" IN AN OPEN, ADVERSARY PROCEEDING

A. NO PRELIMINARY SHOWING OF REASONABLENESS SHOULD BE REQUIRED

The holding of the court below in each of these cases requires that the government, as a condition to the grand jury's receipt of the voice and handwriting exemplars, first establish in an open, adversary proceeding the "reasonableness" of the subpoenas issued to these witnesses. The imposition of any such requirement is, we submit, an unwarranted departure from existing law.

As we earlier indicated, it has long been the function of the grand jury, both in this country and in England, to conduct a "grand inquest, * * * the scope of whose inquiries is not to be limited narrowly by ques-

tions of propriety or forecasts of the probable result of the investigation." *Blair* v. *United States, supra,* 250 U.S. at 282. Its task "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." *United States* v. *Stone,* 429 F. 2d 138, 140 (C.A. 2). As this Court stated in *Wood* v. *Georgia,* 370 U.S. 375, 392, "society's interest is best served by a thorough and extensive investigation." See also *Hannah* v. *Larche,* 363 U.S. 420, 499 (Douglas, J., dissenting). And this includes the following up of "tips, rumors, evidence proferred by the prosecutor, or the personal knowledge of the grand jurors." *Branzburg* v. *Hayes, supra,* slip op. 36.

This Court has repeatedly declined to stop the grand jury's "examination of witnesses * * * until a basis is laid by an indictment formally preferred * * *" (*Hale* v. *Henkel, supra,* 201 U.S. at 65). It stated in *Blair* v. *United States, supra,* 250 U.S. at 282, that the witness "is not entitled to set limits to the investigation that the grand jury may conduct." Scrutiny of the basis, scope or nature of a particular inquisition has been judiciously avoided. See *Costello* v. *United States,* 350 U.S. 359; *Holt* v. *United States,* 218 U.S. 245. Indeed, last Term in *Branzburg* v. *Hayes, supra,* this Court rejected an effort by the media to interject into the grand jury process on First Amendment grounds a type of preliminary hearing similar to the one required by the court of appeals here.[16]

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[16] In *Branzburg,* the preliminary government showing that was proposed was (1) "that there is probable cause to believe

There is, we submit, no more reason in these cases to require that the government litigate the question of "reasonableness" before a subpoena seeking voice and handwriting exemplars can be enforced.[17] Such litigious interruptions of the grand jury process have long been discouraged by this Court. Compare *Cobbledick* v. *United States*, 309 U.S. 323, 325; *DiBella* v. *United States*, 369 U.S. 121; *United States* v. *Ryan*, 402 U.S. 530. Indeed, if inroads on this "acquired * * * independence" (*Costello* v. *United States*, *supra*, 350 U.S. at 362) of grand juries are now to be permitted on the basis of so tenuous a claim of invasion of privacy as is involved here, virtually every grand jury witness will be able to impede the investigative process any time he is subpoenaed to testify or to bring in books and records, for his very

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that the newsman has information which is clearly relevant to a specific probable violation of law"; (2) "that the information sought cannot be obtained by alternative means less destructive of First Amendment rights"; (3) that there is "a compelling and overriding interest in the information." *Branzburg* v. *Hayes*, *supra*, slip op. 19 (Stewart, J., dissenting).

In *Mara*, the court below required that the government make a preliminary showing (1) "that the information sought is relevant to the inquiry"; (2) that "satisfactory * * * exemplars cannot be obtained from other sources without grand jury compulsion," and why; (3) "that the grand jury's request for exemplars is 'adequate, but not excessive, for the purposes of the relevant inquiry,'" that is, "that the grand jury process is not being abused." See Mara Pet. App. A 15–16.

[17] The proposed new Rule 41.1, Fed.R.Crim.P., does not contemplate that the government must make a preliminary showing before a grand jury witness can be required to furnish exemplar evidence. See Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 52 F.R.D. 409, 462 (1971). The proposed rule "provides a procedure by

appearance necessarily involves some marginal interference with his private life. We do not believe that the Fourth Amendment demands or authorizes judicial scrutiny of this sort. As the Second Circuit stated in *United States* v. *Doe, supra,* 457 F. 2d at 899–900:

> In order for the grand jury to function, it must have the cooperation of citizens in producing evidence, and of doing that quickly, subject, of course, to the limits imposed by the Fifth Amendment privilege. The safeguards built into the grand jury system, such as enforced secrecy and use of court process rather than the constable's intruding hand as a means of gathering evidence, severely limit the intrusions into personal security which are likely to occur outside the grand jury process. * * * Apart from [an investigation so sweeping in scope and undiscriminating in character as to offend other basic constitutional precepts], when the grand jury has engaged in neither a seizure nor a search, there is no justification for a court's imposing even so apparently modest a requirement as a showing of "reasonableness"—with the delay in the functioning of the grand jury which that would inevitably entail.

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which a federal magistrate may issue an order authorizing a nontestimonial identification procedure" by law enforcement officers (52 F.R.D. at 467). But, as the Advisory Committee Note following the rule indicates, citing *United States* v. *Doe (Devlin)*, *supra:* "Compelling a suspect to submit to a nontestimonial identification procedure has been sustained when it is accomplished by means of a grand jury subpoena." 52 F.R.D. at 469.

B. AT ALL EVENTS, THE PRELIMINARY HEARING SHOULD NOT BE AN OPEN, ADVERSARY ONE

Even assuming *arguendo* that a grand jury request for exemplar evidence must be accompanied by some showing of "reasonableness" before it can be enforced, however, the court of appeals erred by holding in *Mara* that the preliminary showing must be made in an open, adversary proceeding.[18] We submit that the government, if required to meet any burden at all, should be permitted to show that a grand jury request satisfies Fourth Amendment standards in an *ex parte, in camera* proceeding before an independent magistrate.

This procedure will, of course, safeguard the privacy rights of grand jury witnesses in the present context, such as they are, as effectively as it protects similar rights of other citizens in analogous Fourth Amendment situations where a search warrant or an arrest warrant is involved. At the same time, however, it will not, in contrast to the full-blown adversary hearing required by the court below, cause the type of "undue interruption [to] the inquiry instituted by grand jury" (*Cobbledick* v. *United States*, *supra*, 309 U.S. at 327) that this Court, as we earlier indi-

[18] In *Dionisio*, the court below did not have to consider the type of proceeding in which the government would show "reasonableness," since there was no effort in that case to make a preliminary showing. If therefore this Court should determine that some kind of showing is necessary, it would be appropriate to remand *Dionisio* to the district court to permit the government to satisfy whatever standard this Court might announce.

cated, has been so careful to guard against. Nor will it compromise the "long-established policy" of grand jury secrecy (*United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 681) that has long been recognized as an "indispensable" (*United States* v. *Johnson*, 319 U.S. 503, 513) prerequisite to that body's investigative process. See also *United States* v. *Proctor & Gamble Co., supra*, 356 U.S. at 682. Given the very limited—indeed, in our view, negligible—invasion of privacy involved in taking voice and handwriting exemplars, on the one hand, and the inevitable lengthy delays in, and breaches of the secrecy of, grand jury investigations that would result from requiring that the preliminary showing of "reasonableness" be open and adversary, on the other, we submit that, if a "hearing" requirement is now to be interjected into the grand jury process, the *ex parte*, closed proceeding that we propose is an appropriate accommodation of these conflicting interests.

This accommodation is not inconsistent with *Alderman* v. *United States*, 394 U.S. 165, on which the court below placed heavy reliance. In *Alderman*, the issue concerned the exclusion of evidence already obtained that was the product of an admittedly unlawful search. Here, by contrast, the basic question is whether the grand jury's initial request for certain evidence is

"reasonable" when measured by Fourth Amendment standards. That threshold determination, we submit, may in the present context, just as it is in other contexts, be properly decided by an independent magistrate in *ex parte, in camera* proceedings.[19]

CONCLUSION

For the reasons stated, the judgment of the court of appeals in these cases should be reversed and the district court's orders adjudging respondents in civil contempt should be reinstated. In the event that this Court should determine, however, that some preliminary showing of "reasonableness" is required before these grand jury witnesses must furnish voice and handwriting exemplars, the cases should be remanded

[19] The preliminary showing of reasonableness made by the government in *Mara*, while in our view not necessary, was, we believe, adequate to meet Fourth Amendment standards. The affidavit submitted *in camera* to the district court—which is on file with the Clerk of this Court—states the nature of the unlawful activities under investigation by the grand jury, the origin and character of the writings already introduced as grand jury exhibits, and the suspected relationship of respondent to those writings that led to subpoenaing from him the handwriting exemplars. This, we believe, would suffice to meet whatever burden, if any, might be imposed on the government to make a preliminary showing.

to the district court for further proceedings in accordance with this Court's opinion.

Respectfuly submitted.

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HENRY E. PETERSEN,
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AUGUST 1972.

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INDEX

CASES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-229

UNITED STATES OF AMERICA,

Petitioner,

vs.

ANTONIO DIONISIO, Witness Before the Special February 1971 Grand Jury

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals is reported at 442 F.2d 276. The opinion of the District Court in No. 71-229 (Dionisio Pet. App. C 22-24) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1971. On June 14, 1971 the Court of Appeals denied a petition for rehearing with suggestion for rehearing en banc (Petition for Certiorari App. B, pp. 20-21). On July 8, 1971, Mr. Justice Marshall extended the time

for filing a petition for a writ of certiorari to and including August 13, 1971. The petition was filed on that date and was granted on May 30, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does the Fourth Amendment bar the compelling of a grand jury witness to furnish a voice exemplar for comparison with exhibits consisting of recordings of intercepted wire communications where approximately twenty (20) persons have been subpoenaed to provide exemplars, absent a showing of reasonableness of the request to provide exemplars?

STATEMENT

The Special February 1971 Grand Jury in the Northern District of Illinois is allegedly investigating illegal gambling.[1] It has allegedly received as exhibits voice recordings obtained under court orders, based on warrants issued under 18 U.S.C. (Supp. V) 2518, authorizing interception of wire communications.

After the return of an indictment against Charles Bishop Smith and others the United States District Court for the Northern District of Illinois granted a motion to suppress these intercepted communications. *United States* v. *Charles Bishop Smith, et al.*, No. 70 CR 852 (March 7, 1972, N.D.

[1] The term of the Grand Jury, originally due to expire in August, 1972 has been extended for an additional six (6) months and the government had indicated that appropriate requests to extend the Grand Jury to its full 36 month term will be made. 18 U.S.C. §3331.

of Ill.) (unreported).[2] The government appealed this suppression order and the matter is now pending before the Seventh Circuit. *United States* v. *Smith, et al.*, No. 72-1637.

The Grand Jury subpoenaed approximately twenty (20) persons, including respondent Dionisio, and sought to obtain from him voice exemplars for identification purposes. The witness was informed that he was a potential defendant in a matter being investigated by the Grand Jury. He was asked to examine a transcript of a recording of an intercepted communication and to go to a nearby room and read the transcript into a telephone connected to a recording device. Dionisio refused to give a voice exemplar, asserting rights under both the Fourth and Fifth Amendments. (App. p. 9).

A petition was then filed in the District Court seeking orders directing respondent to furnish a voice exemplar for comparison with the recordings. Following a hearing, the District Court ordered him to furnish the exemplars. The respondent subsequently refused to do so. (App. pp. 6-7). The District Court adjudged him guilty of civil contempt, and committed him to prison until he obeyed its order or the Grand Jury term expired (Petition for Certiorari App. D. p. 25).

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[2] Smith, as did the respondent Dionisio, refused to give voice exemplars and was a party to the opinion under review. After the return of the indictment the Solicitor sought and obtained a dismissal of the petition for certiorari as to Smith. The petitioner Dionisio therefore has an additional defense to his refusal to furnish voice exemplars. *Gelbard* v. *United States*, ... U.S. ....., 33 L.Ed. 2d 179.

The Court of Appeals reversed (442 F. 2d 276). It rejected the claim that the Grand Jury's request for the voice exemplars violated respondent's rights under the Fifth and Sixth Amendments, but concluded that to compel compliance with the request would violate his Fourth Amendment rights. In the Court's view, the Grand Jury was "seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other less unusual, method of compelling the production of the exemplars" (442 F.2d 276, 280). The Court held that the Fourth Amendment applied to Grand Jury proceedings *Hale* v. *Henkel*, 201 U.S. 43 (1906) and that this "seizure" of physical evidence contradicted the "standard of reasonableness" required by the Fourth Amendment, as recently construed in *Davis* v. *Mississippi*, 394 U.S. 721. Equating the Grand Jury's procedure to the police arrests involved in *Davis*, the Court concluded that "[t]he dragnet effect here, where approximately twenty persons were subpoenaed for purposes of identification, has the same invidious effect on fourth amendment rights as the practice condemned in *Davis*". (id. at p. 281).

SUMMARY OF ARGUMENT

Although identifying characteristics such as voice, handwriting, stature, personage and facial features are not protected, in all instances, from compelled production by the Fifth Amendment, *Gilbert* v. *California*, 338 U.S. 263; *United States* v. *Wade*, 338 U.S. 218, those that are not in plain view and require some action on the part of the person compelled, such as voice, handwriting, fingerprints or blood condition are protected by the Fourth Amendment

and may not be compelled absent a showing of probable cause or reasonableness of the request. *Davis* v. *Mississippi*, 394 U.S. 721; *Schmerber* v. *California*, 384 U.S. 757.

The Fourth Amendments prohibition against unreasonable searches and seizures is not limited solely to "police" activities, but also applies to Grand Juries. *Hale* v. *Henkel*, 201 U.S. 43. A witness, summoned before the Grand Jury in response to its subpoena may refuse to give evidence which the Grand Jury seeks to compel in violation of the Fourth Amendment. The Grand Jury's right to obtain evidence from each person summoned before it is not unlimited.

ARGUMENT

I.

The Fourth Amendment Protects a Grand Jury Witness from being Compelled to Furnish Voice Exemplars Absent a Showing of Reasonableness to Compel Them.

The Fourth Amendment "protects people, not places", *Katz* v. *United States*, 389 U.S. 347, 351. As a necessary corollary to its protection of "people", the Fourth Amendment protects those personal characteristics of people which are not in "plain view" and which require some form of compulsion before production, such as blood, *Schmerber* v. *California*, 384 U.S. 757 or fingerprints, *Davis* v. *Mississippi*, 394 U.S. 721.

The Government seems to argue that since *Gilbert* v. *California*, 388 U.S. 263 and *United States* v. *Wade*, 388 U.S. 218 lay to rest any Fifth Amendment claims to resist the taking of voice exemplars it must follow that the Fourth Amendment does not similarly protect unreasonable demands to secure them.

The Government argues that voice exemplars are within the "plain view" exception to the Fourth Amendment relying principally on *Katz* v. *United States*, 389 U.S. 347. This argument misconceives what the Grand Jury sought to obtain. They argue that voice characteristics are on constant public display and therefore to compel an individual to furnish a voice exemplar is to compel him to furnish what is in plain view. This is simply not the case. A person cannot refuse to show his facial features to others unless he were to secrete himself in a locked room. But a person may, as indeed many do, mingle in society, without speaking. To speak requires a conscious act of will,

and unless that act is performed his voice is not "in plain view". Thus, since this characteristic must be created or produced with the physical and mental cooperation of the person, the Fourth Amendments protection of the "person" is applicable here. See: *United States* v. *Harris*, 453 F.2d 1317, 1320 (8th Cir., 1972).

Any doubt which may have existed concerning the relationship of compelled voice exemplars to the Fourth Amendment were resolved by this Court in *Davis* v. *Mississippi*, 394 U.S. 721, where this Court held that there was "no merit in the suggestion . . . that fingerprint evidence, because of its trustworthiness, is not subject to the prescription of the Fourth and Fourteenth Amendments." 394 U.S. 721 at 723. Although this Court did not, in *Davis*, decide whether fingerprint evidence or other physical characteristics could be compelled under judicial authority, but left that question open, implicit in the Court's opinion was the proposition that any judicial warrant or proceeding must be based upon reasonable grounds or probable cause. It is clear from *Davis* and from the Seventh Circuit opinion in *Dionisio* that the probable cause required would not necessarily be the probable cause necessary to return an indictment, but that there must be some showing of reasonableness to compel characteristics otherwise protected by the Fourth Amendment. This is not an unusual departure. Indeed this Court in *Hale* v. *Henkel*, 201 U.S. 43, in establishing the proposition that the Fourth Amendment's prohibition against unreasonable searches and seizures is not limited to "police acts" but also to Grand Jury proceedings, suggested in conclusion that with a showing of reasonableness the very documents whose production were at that stage, prohibited by the Fourth Amendment could be required to be produced the Court stated:

"Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be drawn, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers." *Hale* v. *Henkel,* 201 U.S. 43, 26 S.Ct. 370, p. 380.

II.

In Order to Compel a Voice Exemplar, Otherwise Protected by the Fourth Amendment, There Must Be a Showing of the Reasonableness of the Request.

The Government also argues, that, in spite of Fourth Amendment protections, the Grand Jury may compel voice exemplars from any witness appearing before it.

The Government argues with great force, that a Grand Jury may summon any person to appear before it. The respondent generally agrees with this proposition and with this Court's observation in *Branzenburg* v. *Hayes,* 32 L.Ed. 2d 626 that "Citizens generally are not constitutionally immune from grand jury subpoenas." However, this argument begs the question. The issue in this case is not whether the respondent was properly summoned to appear, but rather whether once summoned he may be required to furnish evidence protected by the Fourth Amendment.

The Grand Jury's right to hear testimony is not an absolute. The witness, in proper circumstances, may invoke the Fifth Amendment and as in *Hale* v. *Henkel,* 201 U.S. 43, rely on the Fourth Amendment's prohibition against unreasonable searches and seizures.

The position advanced by the petitioner would limit *Hale* v. *Henkel,* 201 U.S. 43 solely to a determination of reasonableness in a subpoena requiring the production of

documentary evidence and would abrogate the effect of the Fourth Amendment to all other seizures. We respectfully submit that *Dionisio does not* establish a blanket rule that all grand jury subpoenae requiring the production of voice exemplars are subject to motions to quash based upon a lack of showing of reasonableness but limits its effect to those attempts to compel a citizen to furnish such exemplars when there has been no such showing of reasonableness.

As has been said many times, each case must rest upon its own special facts. *Sibron* v. *New York*, 392 U.S. 40. It is apparent in this case that the grand jury was engaged in a "fishing expedition" which had a "dragnet effect" since they subpoenaed twenty persons to give voice exemplars, including the respondent. There is no showing as to why the respondent was included in this large group of persons. It is clear from the record that no probable cause existed to arrest the respondent so that other attempts could be made to compel a voice exemplar rather than under the alleged aegis of a grand jury subpoena.

To suggest, as required by *Hale* v. *Henkel*, 201 U.S. 43 that the grand jury show the reasonableness of their request to obtain evidence protected by the Fourth Amendment is no less a requirement than a showing that what is sought is reasonable and relevant to the inquiry, without being oppressive. cf. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209.

We respectfully submit that the principles of the *Davis* v. *Mississippi*, 394 U.S. 725 apply with equal force to a subpoena, such as that presented in the instant case.

If the opinion of the Court of Appeals in this case is not valid, all that would be needed to be done to avoid the principles enunciated in *Davis* by any law enforcement

agency would be to subpoena all possible subjects before a grand jury and compel each of them to provide appropriate exemplars. The basis for the issuance of the subpoena could be as frivolous as any basis which could be imagined by a law enforcement officer and the law enforcement agencies would thereby be able to obtain indirectly what *Davis* prohibits directly. The harassment would be as oppressive and violative of personal rights as the action of police acting without grand jury authority condemned in *Davis*. The Fourth Amendment's protection against unreasonable searches and seizures may be violated by a court order to produce evidence as well as by a search conducted by police officials. *Hill* v. *Philpott*, 445 F.2d 144 (7th Cir., 1971); *United States* v. *Bailey*, 327 F.Supp. 802 (N.D. of Ill.).

Grand juries have two basic, if not contrary, functions. A prime function is to investigate possible offenses, *United States* v. *Johnson*, 319 U.S. 503, on the other hand it stands between the accuser and the accused. *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Hannah* v. *Larche*, 363 U.S. 420, 499 (Douglas, J. dissenting). If the grand jury is permitted to compel such exemplars without a showing of reasonableness it will become the oppressor and the function of the grand jury to "safeguard against hasty, malicious and oppressive action", *Ex Parte Bain*, 121 U.S. 1, 12, will have come full circle.

III.

The Showing of Reasonableness for the Obtaining of Exemplars Should Be Open and Adversary.

Petitioner urges upon this Court that if a preliminary showing of reasonableness is necessary, that showing should be an *ex parte in camera* proceeding. (P.Br. pp. 27-29) The reasoning to support this position is two-fold. First,

the secrecy of Grand Jury proceedings must be protected; and, second, an adversary proceeding would result in "inevitable lengthy delays" (P.Br. 28).

Neither of these reasons withstands scrutiny. Regarding secrecy of the Grand Jury the opinion of the Court in the companion case of the witness Mara shows how frail this argument is:

> "We have examined the affidavit and find that it does not recount proceedings before the grand jury. Rather, it states the results the Government derived from its own investigation and then presented to the grand jury. Thus disclosure here cannot be said to discourage the grand jurors from engaging in uninhibited investigation, full discussion, and conscientious voting. Since he is requesting the disclosure, certainly Mara could not be heard to object that the affidavit might reveal disparaging information about him. Moreover, he has been advised that he is a potential defendant so that the Government cannot convincingly contend that divulging the material in the affidavit would precipitate his flight from prosecution. In any case, the Government is well aware of the means at its disposal to prevent escape. Finally, the affidavit does not appear to contain information elicited from complainants and witnesses before the grand jury. Where anonymity is necessary to prevent intimidation or preserve sources of information, deletion of the witnesses' identity may be permitted under the proper standards of trustworthiness and reliability." (citing cases). *In Re September 1971 Grand Jury*, 454 F.2d 580, 583-584 (7th Cir., 1971).

It is within the Government's power to protect the privacy of Grand Jury activities by omitting such activities from mention in its showing of reasonableness. It may still rely, in the proper case, on the confidential informant as well as public information and investigative reports.

Since this Court's decision in *Dennis* v. *United States*, 384 U.S. 855 (1966) the shibboleth of "grand jury secrecy" is no longer the "magical incantation making everything connected with the grand jury's investigation somehow untouchable." *In Re September 1971 Grand Jury*, supra, at 583. Deviations from the adversary system that derogate from the constitutional rights of citizens should not be countenanced as the norm. *United States* v. *United States District Court*, 33 L.Ed.2d 752, 770 (1972); *Alderman* v. *United States*, 394 U.S. 165, 180-185 (1969). Especially is this so where the deviation does not support the goal of the effectiveness of the Grand Jury.

As for the inevitable lengthy delays, the Government takes this provision cavalierly and without citation. To the contrary, it should be noted, the witness Dionisio refused to give his voice exemplar on February 22, 1971 and the decision of the Seventh Circuit upholding his position was filed on March 25, 1971. Similarly, the witness Mara refused to give his handwriting exemplars on September 28, 1971 and the opinion upholding his position was filed on December 1, 1971.

The Government's argument that an adversary hearing would result in "inevitable lengthy delays" further completely overlooks the fact that in most instances it would be only the witness who would suffer from such a delay, if any, since he must subject himself to an order of contempt and possible imprisonment during any period of review. *Cobbledick* v. *United States*, 309 U.S. 323; *United States* v. *Ryan*, 402 U.S. 530, while the Grand Jury whose term may now be extended to three years, 18 U.S.C. §3331, suffers no real delay or hindrance to its investigation.

We therefore submit that the balancing of these factors coupled with this Court's reluctance to adopt proceedings which are antagonistic to the adversary system, *United States* v. *United States District Court*, ... U.S. ....., 33 L.Ed.2d 752; *Alderman* v. *United States*, 394 U.S. 165, require that these proceedings be, in the absence of a strong showing by the Government, adversary hearings.

CONCLUSION

Wherefore, we respectfully submit that the judgment of the court below be affirmed.

Respectfully submitted,

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Attorney for Respondent

CROWLEY AND NASH
GERALD M. WERKSMAN
Of Counsel

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* DIONISIO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 71-229. Argued November 6, 1972—Decided January 22, 1972

A grand jury subpoenaed about 20 persons, including respondent, to give voice exemplars for identification purposes. Respondent, on Fourth and Fifth Amendment grounds, refused to comply. The District Court rejected both claims and adjudged respondent in contempt. The Court of Appeals agreed in rejecting respondent's Fifth Amendment claim but reversed on the ground that the Fourth Amendment required a preliminary showing of reasonableness before a grand jury witness could be compelled to furnish a voice exemplar and that here the proposed "seizures" would be unreasonable because of the large number of witnesses subpoenaed to produce the exemplars. *Held:*

1. The compelled production of the voice exemplars would not violate the Fifth Amendment privilege against compulsory self-incrimination, since they were to be used only for identification purposes, and not for the testimonial or communicative content of the utterances. Pp. 4–6.

2. Respondent's Fourth Amendment claim is also invalid. Pp. 6–16.

(a) A subpoena to compel a person to appear before a grand jury does not constitute a "seizure" within the meaning of the Fourth Amendment, and the fact that many others besides respondent were ordered to give voice recordings did not render the subpoena unconstitutional. *Davis* v. *Mississippi*, 394 U. S. 721, distinguished. Pp. 6–12.

(b) The grand jury's directive to make the voice recording infringed no valid Fourth Amendment interest. Pp. 12–14.

(c) Since neither the summons to appear before the grand jury, nor its directive to give a voice exemplar contravened the Fourth Amendment, the Court of Appeals erred in requiring a

Syllabus

preliminary showing of reasonableness before respondent could be compelled to furnish the exemplar. P. 14.

442 F. 2d 276, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part. DOUGLAS and MARSHALL, JJ., filed dissenting opinions.

SUPREME COURT OF THE UNITED STATES

No. 71-229

United States, Petitioner, *v.* Antonio Dionisio. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January 22, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

A special grand jury was convened in the Northern District of Illinois in February 1971, to investigate possible violations of federal criminal statutes relating to gambling. In the course of its investigation the grand jury received in evidence certain voice recordings that had been obtained pursuant to court orders.[1]

The grand jury subpoenaed approximately 20 persons, including the respondent Dionisio, seeking to obtain from them voice exemplars for comparison with the re-

[1] The court orders were issued pursuant to 18 U. S. C. § 2518, a statute authorizing the interception of wire communications upon a judicial determination that "(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter [including the transmission of wagering information]; (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception; (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

corded conversations that had been received in evidence. Each witness was advised that he was a potential defendant in a criminal prosecution. Each was asked to examine a transcript of an intercepted conversation, and to go to a nearby office of the United States Attorney to read the transcript into a recording device. The witnesses were advised that they would be allowed to have their attorneys present when they read the transcripts. Dionisio and other witnesses refused to furnish the voice exemplars, asserting that these disclosures would violate their rights under the Fourth and Fifth Amendments.

The Government then filed separate petitions in the United States District Court to compel Dionisio and the other witnesses to furnish the voice exemplars to the grand jury. The petitions stated that the exemplars were "essential and necessary" to the grand jury investigation, and that they would "be used solely as a standard of comparison in order to determine whether or not the witness is the person whose voice was intercepted . . . ."

Following a hearing, the district judge rejected the witnesses' constitutional arguments and ordered them to comply with the grand jury's request. He reasoned that voice exemplars, like handwriting exemplars or fingerprints, were not testimonial or communicative evidence, and that consequently the order to produce them would not compel any witness to testify against himself. The district judge also found that there would be no Fourth Amendment violation, because the grand jury subpoena did not itself violate the Fourth Amendment, and the order to produce the voice exemplars would involve no unreasonable search and seizure within the proscription of that Amendment:

> "The witnesses are lawfully before the grand jury pursuant to subpoena. The Fourth Amendment prohibition against unreasonable search and seizure applies only where identifying physical character-

istics, such as fingerprints, are obtained as a result of unlawful detention of a suspect, or when an intrusion into the body, such as a blood test, is undertaken without a warrant, absent an emergency situation. *E. g., Davis* v. *Mississippi*, 394 U. S. 721, 724–728 (1969); *Schmerber* v. *California*, 384 U. S. 757, 770–771 (1966)." [2]

When Dionisio persisted in his refusal to respond to the grand jury's directive, the District Court adjudged him in civil contempt and ordered him committed to custody until he obeyed the court order, or until the expiration of 18 months.[3]

The Court of Appeals for the Seventh Circuit reversed. 442 F. 2d 276. It agreed with the District Court in rejecting the Fifth Amendment claims,[4] but concluded that to compel the voice recordings would violate the Fourth Amendment. In the Court's view, the grand jury was "seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars." *Id.*, at 280. The Court found that the Fourth Amendment applied to grand jury process, and that "under the fourth amendment law enforcement officials may not compel the production of physical evidence absent a showing of the reasonableness of the seizure. *Davis* v. *Mississippi*, 394 U. S. 721 . . . ." *Ibid.*

In *Davis* this Court held that it was error to admit the petitioner's fingerprints into evidence at his trial for

[2] The decision of the District Court is unreported.

[3] The life of the special grand jury was 18 months, but could be extended for an additional 18 months. 18 U. S. C. § 3331.

[4] The Court also rejected the argument that the grand jury procedure violated the witnesses' Sixth Amendment right to counsel. It found the contention particularly without merit in view of the option afforded the witnesses to have their attorneys present while they made the voice recordings. 442 F. 2d 276, 278.

rape, because they had been obtained during a police detention following a lawless wholesale roundup of the petitioner and more than 20 other youths. Equating the procedures followed by the grand jury in the present case to the fingerprint detentions in *Davis*, the Court of Appeals reasoned that "[t]he dragnet effect here, where approximately 20 persons were subpoenaed for purposes of identification, has the same invidious effect on fourth amendment rights as the practice condemned in *Davis*." *Id.*, at 281.

In view of a clear conflict between this decision and one in the Court of Appeals for the Second Circuit,[5] we granted the Government's petition for certiorari. 406 U. S. 956.

I

The Court of Appeals correctly rejected the contention that the compelled production of the voice exemplars would violate the Fifth Amendment. It has long been held that the compelled display of identifiable physical characteristics infringes no interest protected by the privilege against compulsory self-incrimination. In *Holt* v. *United States*, 218 U. S. 245, 252, Mr. Justice Holmes, writing for the Court, dismissed as an "extravagant extension of the Fifth Amendment" the argument that it violated the privilege to require a defendant to put on a blouse for identification purposes. He explained that "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Id.*, at 252–253.

[5] *United States* v. *Doe* (*Schwartz*), 457 F. 2d 895 (affirming civil contempt judgment against grand jury witness for refusal to furnish handwriting exemplars).

More recently, in *Schmerber* v. *California*, 384 U. S. 757, we relied on *Holt*, and noted that

> "both federal and state courts have usually held that [the privilege] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Id.*, at 764 (footnote omitted).

The Court held that the extraction and chemical analysis of a blood sample involved no "shadow of testimonial compulsion upon or enforced communication by the accused." *Id.*, at 765.

These cases led us to conclude in *Gilbert* v. *California*, 388 U. S. 263, that handwriting exemplars were not protected by the privilege against compulsory self-incrimination. While "[o]ne's voice and handwriting are, of course, means of communication," we held that a "mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection." *Id.*, at 267. And similarly in *United States* v. *Wade*, 388 U. S. 218, we found no error in compelling a defendant accused of bank robbery to utter in a line-up words that had allegedly been spoken by the robber. The accused there was "required to use his voice as an identifying physical characteristic, not to speak his guilt." *Id.*, at 222–223.

Wade and *Gilbert* definitively refute any contention that the compelled production of the voice exemplars in this case would violate the Fifth Amendment. The

voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said.[6]

II

The Court of Appeals held that the Fourth Amendment required a preliminary showing of reasonableness before a grand jury witness could be compelled to furnish a voice exemplar, and that in this case the proposed "seizures" of the voice exemplars would be unreasonable because of the large number of witnesses summoned by the grand jury and directed to produce such exemplars. We disagree.

The Fourth Amendment guarantees that all people shall be "secure in their persons, houses, papers, and

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[6] The Court of Appeals for the Seventh Circuit appears to have recanted somewhat from its clear and correct holding in the present case that the compelled production of voice exemplars would not violate the privilege against compulsory self-incrimination. In subsequently explaining that holding, the Court qualified it:

"Nevertheless, the witnesses were potential defendants, and since the purpose of the voice exemplars was to identify the voices obtained by FBI agents pursuant to a court-ordered wiretap, the self-incriminatory impact of the compelled exemplars was clear. Thus the compelled exemplars were at odds with the spirit of the Fifth Amendment. Because the Fifth Amendment illuminates the Fourth (see . . . Boyd v. United States [116 U. S. 616] . . .), the Fourth Amendment violation appears more readily than where immunity is granted, and in *Dionisio* immunity had not yet been granted." *Fraser* v. *United States*, 452 F. 2d 616, 619 n. 5.

But *Boyd* dealt with the compulsory production of private books and records, testimonial sources, a circumstance in which the "Fourth and Fifth Amendments run almost into each other." 116 U. S., at 630. In the present case, by contrast, no Fifth Amendment interests are jeopardized, there is no hint of testimonial compulsion. The Court of Appeals' subsequent attempt to read the "spirit of the Fifth Amendment" into the production of voice exemplars cannot survive comparison with *Wade*, *Gilbert*, and *Schmerber*.

effects, against unreasonable searches and seizures . . . ." Any Fourth Amendment violation in the present setting must rest on a lawless governmental intrusion upon the privacy of "persons" rather than on interference with "property relationships or private papers." *Schmerber* v. *California*, 384 U. S. 757, 767; see *United States* v. *Doe* (Schwartz), 457 F. 2d 895, 897. In *Terry* v. *Ohio*, 392 U. S. 1, the Court explained the protection afforded to "persons" in terms of the statement in *Katz* v. *United States*, 389 U. S. 347, that "the Fourth Amendment protects people, not places," *id.*, at 351, and concluded that "wherever an individual may harbor a reasonable 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion." *Terry* v. *Ohio*, 392 U. S., at 9.

As the Court made clear in *Schmerber*, *supra*, the obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels—the "seizure" of the "person" necessary to bring him into contact with government agents, see, *Davis* v. *Mississippi*, 394 U. S. 721, and the subsequent search for and seizure of the evidence. In *Schmerber* we found the initial seizure of the accused justified as a lawful arrest, and the subsequent seizure of the blood sample from his body reasonable in light of the exigent circumstances. And in *Terry*, we concluded that neither the initial seizure of the person, an investigatory "stop" by a policeman, nor the subsequent search, a pat down of his outer clothing for weapons, constituted a violation of the Fourth and Fourteenth Amendments. The constitutionality of the compulsory production of exemplars from a grand jury witness necessarily turns on the same dual inquiry—whether either the initial compulsion of the person to appear before the grand jury, or the subsequent directive to make a voice recording is an unreasonable "seizure" within the meaning of the Fourth Amendment.

It is clear that a subpoena to appear before a grand jury is not a "seizure" in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome. Last Term we again acknowledged what has long been recognized,[7] that "[c]itizens generally are not constitutionally immune from grand jury subpoenas . . . ." *Branzburg* v. *Hayes*, 408 U. S. 665, 682. We concluded that:

> "[a]lthough the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, *United States* v. *Bryan*, 339 U. S., at 331; *Blackmer* v. *United States*, 284 U. S. 421, 438 (1932); 8 J. Wigmore, Evidence § 2192 (McNaughton rev. 1961), is particularly applicable to grand jury proceedings." *Id.*, at 688.

These are recent reaffirmations of the historically grounded obligation of every person to appear and give his evidence before the grand jury. "The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." *Blair* v. *United States*, 250 U. S. 273, 281. See also *Garland* v. *Torre*, 259 F. 2d 545, 549. And while the duty may be "onerous" at times, it is "necessary to the administration of justice." *Blair* v. *United States*, *supra*, at 281.[8]

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[7] See generally *Kastigar* v. *United States*, 406 U. S. 441, 443–444; *Blair* v. *United States*, 250 U. S. 273, 279–281; 8 J. Wigmore, Evidence § 2191 (J. McNaughton rev. 1961).

[8] The obligation to appear is no different for a person who may himself be the subject of the grand jury inquiry. See *United States* v. *Doe* (*Schwartz*), 457 F. 2d 895, 898; *United States* v. *Winter*, 348 F. 2d 204, 207–208.

The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative "stop" in more than civic obligation. For, as Judge Friendly wrote for the Court of Appeals for the Second Circuit:

> "The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court." *United States* v. *Doe (Schwartz)* 457 F. 2d 895, 898.

Thus the Court of Appeals for the Seventh Circuit correctly recognized in a case subsequent to the one now before us, that a "grand jury subpoena to testify is not that kind of governmental intrusion on privacy against which the Fourth Amendment affords protection, once the Fifth Amendment is satisfied." *Fraser* v. *United States*, 452 F. 2d 616, 620; cf. *United States* v. *Weinberg*, 439 F. 2d 743, 748–749.

This case is thus quite different from *Davis* v. *Mississippi*, *supra*, on which the Court of Appeals primarily relied. For in *Davis* it was the initial seizure—the lawless dragnet detention—that violated the Fourth and Fourteenth Amendments—not the taking of the fingerprints. We noted that "[i]nvestigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention," 394 U. S., at 726, and we left open the question whether, consistently with the Fourth and Fourteenth Amendments, narrowly circumscribed procedures might be developed for obtaining fingerprints from people when

there was no probable cause to arrest them. *Id.*, at 728.[9] *Davis* is plainly inapposite to a case where the initial restraint does not itself infringe the Fourth Amendment.

This is not to say that a grand jury subpoena is some talisman that dissolves all constitutional protections. The grand jury cannot require a witness to testify against himself. It cannot require the production by a person of private books and records that would incriminate him. See *Boyd* v. *United States*, 116 U. S. 616, 633–635.[10] The Fourth Amendment provides protection against a grand jury subpoena *duces tecum* too sweeping in its terms "to be regarded as reasonable." *Hale* v. *Henkel*, 201 U. S. 43, 76; cf. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 208, 217. And last Term, in the context of a First Amendment claim, we indicated that the Constitution could not tolerate the transformation of the grand jury into an instrument of oppression: "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as

[9] Judge Weinfeld correctly characterized *Davis* as "but another application of the principle that the Fourth Amendment applies to all searches and seizures of the person, no matter what the scope or duration. It held that in the circumstances there presented the detention for the sole purpose of fingerprinting was in violation of the Fourth Amendment ban against unreasonable search and seizure." *Thom* v. *New York Stock Exchange*, 306 F. Supp. 1002, 1007 (footnote omitted). See also *Allen* v. *Cupp*, 426 F. 2d 756, 760.

[10] While *Boyd* was concerned with a motion to produce invoices at a forfeiture trial, the Court treated it as the equivalent of a subpoena *duces tecum*, and *Hale* v. *Henkel*, 201 U. S. 43, 76, applied *Boyd* in the context of a grand jury subpoena.

the Fifth." *Branzburg* v. *Hayes*, 408 U. S. 665, 707–708. See also, *id.*, at 710 (POWELL, J., concurring).

But we are here faced with no such constitutional infirmities in the subpoena to appear before the grand jury or in the order to make the voice recordings. There is, as we have said, no valid Fifth Amendment claim. There was no order to produce private books and papers, and no sweeping subpoena *duces tecum*. And even if *Branzburg* be extended beyond its First Amendment moorings and tied to a more generalized due process concept, there is still no indication in this case of the kind of harassment that was of concern there.

The Court of Appeals found critical significance in the fact that the grand jury had summoned approximately 20 witnesses to furnish voice exemplars.[11] We think that fact is basically irrelevant to the constitutional issues here. The grand jury may have been attempting to identify a number of voices on the tapes in evidence, or it might have summoned the 20 witnesses in an effort to identify one voice. But whatever the case, "[a] grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed . . . ." *United States* v. *Stone*, 429 F. 2d 138, 140. See also *Wood* v. *Georgia*, 370 U. S. 375, 392. As the Court recalled last Term, "Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad." *Branzburg* v.

[11] As noted above, *ante*, p. —, there is no valid comparison between the dententions of the 24 youths in *Davis*, and the grand jury subpoenas to the witnesses here. While the dragnet detentions by the police did constitute substantial intrusions into the Fourth and Fourteenth Amendment rights of each of the youths in *Davis*, no person has a justifiable expectation of immunity from a grand jury subpoena.

Hayes, 408 U. S., at 688.[12] The grand jury may well find it desirable to call numerous witnesses in the course of an investigation. It does not follow that each witness may resist a subpoena on the ground that too many witnesses have been called. Neither the order to Dionisio to appear, nor the order to make a voice recording was rendered unreasonable by the fact that many others were subjected to the same compulsion.

But the conclusion that Dionisio's compulsory appearance before the grand jury was not an unreasonable "seizure" is the answer to only the first part of the Fourth Amendment inquiry here. Dionisio argues that the grand jury's subsequent directive to make the voice recording was itself an infringement of his rights under the Fourth Amendment. We cannot accept that argument.

In *Katz* v. *United States*, *supra*, we said that the Fourth Amendment provides no protection for what "a person knowingly exposes to the public, even in his home or office . . . ." 389 U. S. 347, 351. The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect

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[12] "[The grand jury] is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. *Hendricks* v. *United States*, 223 U. S. 178, 184." *Blair* v. *United States*, 250 U. S. 273, 282.

that his face will be a mystery to the world. As the Court of Appeals for the Second Circuit stated:

> "Except for the rare recluse who chooses to live his life in complete solitude, in our daily lives we constantly speak and write, and while the content of a communication is entitled to Fourth Amendment protection, . . . the underlying identifying characteristics—the constant factor throughout both public and private communications—are open for all to see or hear. There is no basis for constructing a wall of privacy against the grand jury which does not exist in casual contacts with strangers. Hence, no intrusion into an individual's privacy results from compelled execution of handwriting or voice exemplars; nothing is being exposed to the grand jury that has not previously been exposed to the public at large." *United States* v. *Doe (Schwartz)*, 457 F. 2d 895, 898–899.

The required disclosure of a person's voice is thus immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in *Schmerber*. "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." *Schmerber* v. *California*, 384 U. S. 757, 769–770. Similarly, a seizure of voice exemplars does not involve the "severe, though brief, intrusion upon cherished personal security," effected by the "patdown" in *Terry*—"surely . . . an annoying, frightening, and perhaps humiliating experience." *Terry* v. *Ohio*, 392 U. S. 1, 24–25. Rather, this is like the fingerprinting in *Davis*, where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself, "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Davis*

v. *Mississippi*, 394 U. S. 721, 727; cf. *Thom* v. *New York Stock Exchange*, 306 F. Supp. 1002, 1009.

Since neither the summons to appear before the grand jury, nor its directive to make a voice recording infringed upon any interest protected by the Fourth Amendment, there was no justification for requiring the grand jury to satisfy even the minimal requirement of "reasonableness" imposed by the Court of Appeals.[13] See *United States* v. *Doe (Schwartz)*, 457 F. 2d 895, 899–900. A grand jury has broad investigative powers to determine whether a crime has been committed and who has committed it. The jurors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge. *Branzburg* v. *Hayes*, 408 U. S. 665, 701. No grand jury witness is "entitled to set limits to the investigation that the grand jury may conduct." *Blair* v. *United States*, 250 U. S. 273, 282. And a sufficient basis for an indictment may only emerge at the end of the investigation when all the evidence has been received.

> "It is impossible to conceive that . . . the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted." *Hale* v. *Henkel*, 201 U. S. 43, 65.

Since Dionisio raised no valid Fourth Amendment claim, there is no more reason to require a preliminary showing of reasonableness here than there would be in the case of any witness who, despite the lack of any constitutional or statutory privilege, declined to answer

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[13] In *Hale* v. *Henkel*, 201 U. S. 43, 77, the Court found that such a standard had not been met, but as noted above, *ante*, p. —, that was a case where the Fourth Amendment had been infringed by an overly broad subpoena to produce books and papers.

a question or comply with a grand jury request. Neither the Constitution nor our prior cases justify any such interference with grand jury proceedings.[14]

The Fifth Amendment guarantees that no civilian may be brought to trial for an infamous crime "unless on a presentment or indictment of a Grand Jury." This constitutional guarantee presupposes an investigative body "acting independently of either prosecuting attorney or judge," *Stirone* v. *United States*, 361 U. S. 212, 218, whose mission is to clear the innocent, no less than to bring to trial those who may be guilty.[15] Any holding

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[14] MR. JUSTICE MARSHALL in dissent suggests that a preliminary showing of "reasonableness" is required where the grand jury subpoenas a witness to appear and produce handwriting or voice exemplars, but not when it subpoenas him to appear and testify. Such a distinction finds no support in the Constitution. The dissent argues that there is a potential Fourth Amendment violation in the case of a subpoenaed grand jury witness because of the asserted intrusiveness of the initial subpoena to appear—the possible stigma from a grand jury appearance and the inconvenience of the official restraint. But the initial directive to appear is as intrusive if the witness is called simply to testify as it is if he is summoned to produce physical evidence.

[15] "[T]he institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial." *Ex parte Bain*, 121 U. S. 1, 11 (quoting grand jury charge of Justice Field). See also *Wood* v. *Georgia*, 370 U. S. 375, 390.

that would saddle a grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws. Cf. *United States v. Ryan*, 402 U. S. 530, 532–533; *Costello* v. *United States*, 350 U. S. 359, 363–364; *Cobbledick* v. *United States*, 309 U. S. 323, 327–328.[16] The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.

Since the Court of Appeals found an unreasonable search and seizure where none existed, and imposed a preliminary showing of reasonableness where none was required, its judgment is reversed and this case is remanded to that Court for further proceedings consistent with this opinion.

It is so ordered.

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[16] The possibilities for delay caused by requiring initial showings of "reasonableness" are illustrated by the Court of Appeals' subsequent decision in *In re September 1971 Grand Jury*, 454 F. 2d 580, rev'd *sub nom. United States* v. *Mara*, *post*, p. —, where the Court held that the Government was required to show in an adversary hearing that its request for exemplars was reasonable, and "reasonableness" included proof that the exemplars could not be obtained from other sources.

SUPREME COURT OF THE UNITED STATES

Nos. 71-229 AND 71-850

United States, Petitioner,
71-229 *v.*
Antonio Dionisio.

United States, Petitioner,
71-850 *v.*
Richard J. Mara aka Richard J. Marasovich.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January 22, 1973]

MR. JUSTICE BRENNAN, concurring in part and dissenting in part.

I agree, for the reasons stated by the Court, that petitioners' Fifth Amendment claims are without merit. I dissent, however, from the Court's rejection of petitioners' Fourth Amendment claims as also without merit. I agree that no unreasonable seizure in violation of the Fourth Amendment is effected by a grand jury subpoena limited to requiring the appearance of a suspect to *testify*. But insofar as the subpoena requires a suspect's appearance in order to obtain his voice or handwriting exemplars from him, I conclude, substantially in agreement with Part II of my Brother MARSHALL's dissent, that the reasonableness under the Fourth Amendment of such a seizure cannot simply be presumed. I would therefore affirm the judgments of the Court of Appeals reversing the contempt convictions and remand with directions to the District Court to afford the Government the opportunity to prove reasonableness under the standard fashioned by the Court of Appeals.

SUPREME COURT OF THE UNITED STATES

Nos. 71–229 AND 71–850

United States, Petitioner, 71–229 *v.* Antonio Dionisio. United States, Petitioner, 71–850 *v.* Richard J. Mara aka Richard J. Marasovich.	On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January 22, 1973]

MR. JUSTICE DOUGLAS, dissenting.

Judge William Campbell, who has been on the District Court in Chicago for over 32 years, recently made the following indictment against the grand jury: [1]

> "This great institution of the past has long ceased to be the guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the prosecutor—too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury."

It is indeed common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive. The concession by the Court that the grand jury is no longer in a realistic sense "a protective bulwark standing solidly between the ordinary citizen and over-zealous prosecutor" is reason enough to affirm these judgments.

It is not uncommon for witnesses summoned to appear

[1] 55 Fed. Rules Dec. 229, 253 (1972).

before the grand jury at a designated room to discover that the room is the room of the prosecutor. The cases before us today are prime examples of this perversion.

Respondent Dionisio and approximately 19 others were subpoenaed by the Special February 1971 Grand Jury for the Northern District of Illinois in an investigation of illegal gambling operations. During the investigation the grand jury had received as exhibits voice recordings obtained under court orders, on warrants issued under 18 U. S. C. § 2518 authorizing wiretaps. The witnesses were instructed to go to the U. S. Attorney's office, with their own counsel if they desired, and in the company of an FBI agent who had been appointed as an agent of the grand jury by its foreman, and to read the transcript of the wire interception. The readings were recorded. The grand jury then compared the voices taken from the wiretap and the witnesses' record. Dionisio refused to make the voice exemplars on the grounds they were violating his rights under the Fourth and Fifth Amendments. The Government filed in the United States District Court for the Northern District of Illinois to compel the witnesses to furnish the exemplars to the grand jury. The court rejected the constitutional arguments of the defendants and demanded compliance. Dionisio again refused and was adjudged in civil contempt and placed in prison until he obeyed the court order or until the term of the special grand jury expired. The Court of Appeals reversed, concluding that to compel compliance would violate the Fourth Amendment rights. It held that voice exemplars are protected by the Constitution from unreasonable seizures and that the Government failed to show the reasonableness of its actions.

The Special September 1971 Grand Jury, also in the Northern District of Illinois, was convened to investigate thefts of interstate shipments of goods that occurred

in the State. Respondent Mara was subpoenaed and was requested to submit before the grand jury a sample of his handwriting. Mara refused. The Government went to the District Court for the Northern District of Illinois, asserting to the court that the handwriting exemplars were "essential and necessary" to the investigation. In an "in camera" proceeding, the Court held that the witness must comply with the request of the grand jury. The Court of Appeals reversed on the basis of its decision in *In re Dionisio*. It outlined the procedures the Government must follow in cases of this kind. First, the hearing to determine the constitutionality of the seizure must be held in open court in an adversary manner. Substantially, the Government must show that the grand jury was properly authorized to investigate a matter that Congress had power to regulate, that the information sought was relevant to the inquiry, and that the grand jury's request for exemplars was adequate, but not excessive, for the purposes of the relevant inquiry.

Today, the Court in its majority overrules this reasoned opinion of the Seventh Circuit.

Under the Fourth Amendment law enforcement officers may not compel the production of evidence absent a showing of the reasonableness of the seizure. *Davis* v. *Mississippi*, 394 U. S. 721; *Boyd* v. *United States*, 116 U. S. 616. The test protects the person's expectation of privacy over the thing. We said in *Katz* v. *United States*, "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not subject of Fourth Amendment protection. But what he seeks to preserve as private, even though in an area accessible to the public, may be constitutionally protected." 389 U. S. 347, 351. The Government asserts that handwriting and voice exemplars do not invade the privacy of an

individual when taken because they are physical characteristics that are exposed to the public. It argues that, unless the person involved is a recluse, these characteristics are not meant to be private to the individual and thus are not subject to the aid of the Fourth Amendment.

This Court has held that fingerprints are subject to the requirements of the Search and Seizure Clause of the Fourth Amendment, *Davis* v. *Mississippi*, 394 U. S. 721. On the other hand, facial scars, birthmarks, and other facial features have been said to be "in plain view" and not protected. *United States* v. *Doe* (*Schwartz*), 457 F. 2d 895.

In *Davis* the sheriff in Mississippi rounded up 24 Blacks when a rape victim described her assailant only as a young Negro. Each was fingerprinted and then released. Davis was presented to the victim but was not identified. He was jailed without probable cause, and only later did the FBI confirm that his fingerprints matched those on the window of the victim's home. The Court held that the fingerprints could not be admitted, as they were seized without reasonable grounds. "Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrest" or "investigatory detentions." *Davis* v. *Mississippi*, 394 U. S. 721, 726–727. The dragnet effect in *Dionisio*, where approximately 20 people were subpoenaed for purposes of identification, was just the kind of invasion that the *Davis* case sought to prevent. Facial features can be presented to the public regardless of the cooperation or compulsion of the owner of the features. But to get the exemplars, the individual must

be involved. So, although a person's handwriting is used in everyday life and speech is the vehicle of normal, social intercourse, when these personal characteristics are sought for purposes of identification, the government enters the zone of privacy and in my view must make a showing of reasonableness before seizures may be made.

The Government contends that since the production was before the grand jury, a different standard of constitutional law exists because the grand jury has broad investigatory powers. *Blair* v. *United States*, 250 U. S. 273. Cf. *United States* v. *Bryan*, 339 U. S. 323. The Government concedes that the Fourth Amendment applies to the grand jury and prevents it from executing subpoenaes *duces tecum* that are overly broad. *Hale* v. *Henkel*, 201 U. S. 43, 76. It asserts, however, that that is the limit of its application. But the Fourth Amendment is not so limited, as this Court has held in *Davis, supra*, and reiterated in *Terry* v. *Ohio*, 392 U. S. 1, where it held that the Amendment comes into effect whether or not there is a fullblown search. The essential purpose is to extend its protection "wherever an individual may harbor a reasonable 'expectation of privacy.'" 392 U. S. 1, 9.

Just as the nature of the Amendment rebels against the limits that the Government seeks to impose on its coverage, so does the nature of the grand jury itself. It was secured at Runnymede from King John as a cornerstone of the liberty of the people. It was to serve as a buffer between the State and the offender. For no matter how obnoxious a person may be, the United States cannot prosecute for a felony without an indictment. The individual is therefore protected by a body of his peers who have no axes to grind or any government agency to serve. It is the only accusatorial body of the Federal Government recognized by the Constitu-

tion. "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."[2] *Stirone* v. *United States*, 361 U. S. 212, 218. But here, as the Court of Appeals said, "It is evident that the grand jury is seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars." *Dionisio* v. *United States*, 442 F. 2d 276, 280. See *Hannah* v. *Larche*, 363 U. S. 420, 497–499 (dissenting opinion). Are we to stand still and watch the prosecution evade its own constitutional restrictions on its powers by turning the grand jury into its agents?

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[2] As Mr. Justice Black said in *In re Groban*, 352 U. S. 330, 346–347:

"The traditional English and American grand jury is composed of 12 to 23 members selected from the general citizenry of the locality where the alleged crime was committed. They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officers' misrepresentation, unintential or otherwise, of the witness' statements and conduct before the grand jury. The witness can call on the grand jurors if need be for their normally unbiased testimony as to what occurred before them."

Although that excerpt is from a dissent on the particular facts of the case, there could be no disagreement as to the accuracy of the description of the grand jury's historical function.

The tendency is for government to use shortcuts in its search for instruments more susceptible to its manipulation than was the historic grand jury. See *Hannah* v. *Larche*, 363 U. S. 420, 505 (dissenting opinion); *Jenkins* v. *McKeithen*, 395 U. S. 411.

Are we to allow the Government to usurp powers that were granted to the people by Magna Carta and codified in our Constitution? That will be the result of the majority opinion unless we continue to apply to the grand jury the protection of the Fourth Amendment.

As the Court stated in *Hale* v. *Henkel*, 201 U. S. 43, 59, "the most valuable function of the grand jury" was "to stand between the prosecutor and the accused, or to determine whether the charge was founded upon credible testimony or was dictated by malice or personal illwill."

The Court held in that case that the Fourth Amendment was applicable to grand jury proceedings and that a sweeping all-inclusive subpoena was "equally indefensible as a search warrant would be if couched in similar terms." *Id.*, 77.

Of course, the grand jury can require people to testify. *Hale* v. *Henkel* makes plain that proceedings before the grand jury do not carry all of the impedimenta of a trial before a petit jury. To date the grand jury cases have involved only testimonial evidence. To say, as the Government suggests, that nontestimonial evidence is free from any restraint imposed by the Fourth Amendment is to give those, who today manipulate grand juries, vast and uncontrollable power.

The executive, acting through a prosecutor, could not have obtained these exemplars as he chose, for as stated by the Court of Appeals for the Eighth Circuit, "We conclude that the taking of the handwriting exemplars . . . was a search and seizure under the Fourth Amendment." *United States* v. *Harris*, 453 F. 2d 1317, 1319. As *Katz* v. *United States*, *supra*, makes plain the searches that may be made without prior approval by judge or magistrate are "subject only to a few specifically established and well-delineated exceptions." 389 U. S., at 357.

The showing required by the Court of Appeals in the *Mara* case was that the Government's showing of need

for the exemplars be "reasonable," which "is not necessarily synonymous with probable cause." 454 F. 2d 580, 584. When we come to grand juries, probable cause in the strict Fourth Amendment meaning of the term does not have in it the same ingredients pointing toward guilt as it does in the arrest and trial of people. In terms of probable cause in the setting of the grand jury, the question is whether the exemplar sought is in some way connected with the suspected criminal activity under investigation. Certainly less than that showing would permit the Fourth Amendment to be robbed of all of its vitality.

In the *Mara* case the prosecutor submitted to the District Court an affidavit of a Government investigator stating the need for the exemplar based on its investigation. The District Court passed on the matter *in camera*, not showing the affidavit to either petitioner or his counsel. The Court of Appeals, relying on *Alderman* v. *United States*, 394 U. S. 165, 183, held that in such cases there should be an adversary proceeding. 454 F. 2d, at 582–583. If "reasonable cause" is to play any function in curbing the executive appetite to manipulate grand juries, there must be an opportunity for a showing that there was no "reasonable cause." As we stated in *Alderman:* "Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands." 394 U. S., at 184.

The District Court in the *Dionisio* case went part way by allowing the witness to have his counsel present when the voice exemplars were prepared in the prosecutor's office. 442 F. 2d, at 278. The Court of Appeals acted

in a traditionally fair way when it ruled that the reasonableness of a prosecutor's request for exemplars be put down for an adversary hearing before the District Court. It would be a travesty of justice to allow the prosecutor to do under the cloak of the grand jury what he could not do on his own.

In view of the disposition which I would make of these cases, I need not reach the Fifth Amendment question. But lest there be any doubt as to my position, I adhere to my dissents in *United States* v. *Wade*, 388 U. S. 218, 243, and in *Schmerber* v. *California*, 384 U. S. 757, 772–779, to the effect that the Fifth Amendment is not restricted to testimonial compulsion.

SUPREME COURT OF THE UNITED STATES

Nos. 71–229 AND 71–850

United States, Petitioner, 71–229 *v.* Antonio Dionisio. United States, Petitioner, 71–850 *v.* Richard J. Mara aka Richard J. Marasovich.	On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January 22, 1973]

MR. JUSTICE MARSHALL, dissenting.

I

The Court considers *United States* v. *Wade*, 388 U. S. 218, 221–223 (1967), and *Gilbert* v. *California*, 388 U. S. 263, 265–267 (1967), dispositive of respondent Dionisio's contention that compelled production of a voice exemplar would violate his Fifth Amendment privilege against compulsory self-incrimination. Respondent Mara also argued below that compelled production of the handwriting and printing exemplars sought from him would violate his Fifth Amendment privilege. I assume the Court would consider *Wade* and *Gilbert* to be dispositive of that claim as well.[1] The Court reads those cases as holding that voice and handwriting exemplars may be sought for the exclusive purpose of measuring "the physi-

[1] Before this Court respondent Mara has argued only that the Government may be seeking the handwriting exemplars to obtain not merely identification evidence, but incriminating "testimonial" evidence. I certainly agree with the Court that if respondent's contention proves correct, he will be entitled to assert his Fifth Amendment privilege.

cal properties" of the witness' voice or handwriting without running afoul of the Fifth Amendment privilege. *Ante*, at —. Such identification evidence is not within the purview of the Fifth Amendment, the Court says, for, at least since *Schmerber* v. *California*, 384 U. S. 757, 764 (1966), it has been clear that while "the privilege is a bar against compelling 'communications' or 'testimony,' . . . compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."

I was not a Member of this Court when *Wade* and *Gilbert* were decided. Had I been, I would have found it most difficult to join those decisions insofar as they dealt with the Fifth Amendment privilege. Since, as I discuss in Part II, I consider the Fourth Amendment to require affirmance of the decisions below in these cases, I need not rely at this time upon the Fifth Amendment privilege. Nevertheless, I feel constrained to express here at least my serious reservations concerning the Fifth Amendment portions of *Wade* and *Gilbert*, since those decisions are so central to the Court's result today.

The root of my difficulty with *Wade* and *Gilbert* is the testimonial evidence limitation that has been imposed upon the Fifth Amendment privilege in the decisions of this Court. That limitation is at odds with what I have always understood to be the function of the privilege. I would, of course, include testimonial evidence within the privilege, but I have grave difficulty drawing a line there. For I cannot accept the notion that the Government can compel a man to cooperate affirmatively in securing incriminating evidence when that evidence could not be obtained without the cooperation of the suspect. Indeed, until *Wade* and *Gilbert*, the Court had never carried the testimonial limitation so far as to allow law enforcement officials to enlist an in-

dividual's overt assistance—that is, to enlist his will—in incriminating himself. And I remain unable to discern any substantial constitutional footing on which to rest that limitation on the reach of the privilege.

Certainly it is difficult to draw very much support for the testimonial limitation from the language of the Amendment itself. The Fifth Amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." Nowhere is the privilege explicitly restricted to testimonial evidence. To read such a limitation into the privilege through its reference to "witness" is just the sort of crabbed construction of the provision that this Court long eschewed. Thus, some 80 years ago the Court rejected the contention that a grand jury witness could not invoke the privilege because it applied, in terms, only in a "criminal case." *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892). The Court emphasized that the privilege "is as broad as the mischief against which it seeks to guard." *Ibid.* Even earlier, the Court, in holding that the privilege could be invoked in the context of a civil forfeiture proceeding, had warned that

> "constitutional provisions for the security of the person and property should be construed liberally. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance." *Boyd* v. *United States*, 116 U. S. 616, 635 (1886).

Moreover, *Boyd* itself, which involved a subpoena directed at private papers, makes clear that "witness" is not to be restricted to the act of giving oral testimony against oneself. Rather, that decision suggests what I believe to be the most reasonable construction of the protection afforded by the privilege—namely, protection

against being "compell[ed] . . . to furnish evidence against" oneself, *id.*, at 637. See also *Schmerber* v. *California*, 384 U. S., at 776–777 (Black, J., dissenting).

Such a construction is dictated by the purpose of the privilege. In part, of course, the privilege derives from the view that certain forms of compelled evidence are inherently unreliable. See, *e. g.*, *In re Gault*, 387 U. S. 1, 47 (1967). But the privilege—as a constitutional guarantee subject to invocation by the individual—is obviously far more than a rule concerned simply with the probative force of certain evidence. Its roots "tap the basic stream of religious and political principle [and reflect] the limits of the individual's attornment to the state . . . ." *Ibid.* Its "constitutional foundation . . . is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' . . . , to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda* v. *Arizona*, 384 U. S. 436, 460 (1966). Cf. also *Rogers* v. *Richmond*, 365 U. S. 534, 540–541 (1961). It is only by prohibiting the Government from compelling an individual to cooperate affirmatively in securing incriminating evidence which could not be obtained without his active assistance, that "the inviolability of the human personality" is assured. In my view, the testimonial limitation on the privilege simply fails to take account of this purpose.

The root of the testimonial limitation seems to be Mr. Justice Holmes' opinion for the Court in *Holt* v. *United States*, 218 U. S. 245 (1910). In *Holt*, the defendant challenged the admission at trial of certain testimony that a blouse belonged to the defendant. A witness

testified that defendant put on the blouse and that it fitted him. The defendant argued that this testimony violated his Fifth Amendment privilege because he had acted under duress. In the course of disposing of the defendant's argument, Justice Holmes said that "the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Id.*, at 252–253. This remark can only be considered *dictum*, however, for the case arose before this Court established the rule that illegally seized evidence may not be admitted in federal court, see *Weeks* v. *United States*, 232 U. S. 383 (1914), and thus, Holt's claim of privilege was ultimately disposed of simply on the ground that "when [a man] is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent. *Adams* v. *New York*, 192 U. S. 585." 218 U. S., at 253.

With its decision in *Schmerber*, however, the Court elevated the *dictum* of *Holt* to full constitutional stature. Justice Holmes' language was central to the Court's conclusion that the taking of a blood sample, over the objection of the individual, to determine alcoholic content was not barred by the Fifth Amendment privilege since the resulting blood test evidence "was neither [the individual's] testimony nor evidence relating to some communicative act . . . ." 384 U. S., at 765. Indeed, the Court appeared to consider it established since *Holt* that the Fifth Amendment privilege extended only to " 'testimony' " or " 'communications,' " but not to " 'real or physical evidence,' " *id.*, at 764; and this "established" principle was sufficient, for the Court, to dispose of any "loose dicta" in *Miranda* which might suggest a more extensive purpose for the privilege.

After *Schmerber*, *Wade* and *Gilbert* were relatively easy steps for a Court focusing exclusively on the nature of the evidence compelled. Thus, the Court indicated that "compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber," was "no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse." 388 U. S., at 222. Similarly, in *Gilbert*, 388 U. S., at 266–267, the Court reasoned that "[a] mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying characteristic outside [the privilege's] protection."

Yet if we look beyond the testimonial limitation, *Wade* and *Gilbert* clearly were not direct and easy extensions of *Schmerber* and *Holt*. For it is only in *Wade* and *Gilbert* that the Court, for the first time, held in effect that an individual could be compelled to give to the State evidence against himself which could be secured only through his affirmative cooperation—that is, "to accuse himself by a volitional act which differs only in degree from compelling him to act out the crime," *Wade* v. *United States*, 388 U. S., at 261 (Fortas, J., dissenting). The voice and handwriting samples sought in *Wade* and *Gilbert* simply could not be obtained without the individual's active cooperation. *Holt* and *Schmerber* were certainly not such cases. In those instances the individual was required at most to submit passively to a blood test or to the fitting of a shirt. Whatever the reasoning of those decisions, I do not understand them to involve the sort of interference with an individual's personality and will that the Fifth Amendment privilege was intended to prevent. To be sure, in situations such as those presented in *Holt* and *Schmerber* the individual may resist and be physically subdued, and in that sense, compulsion may be employed. Or, alternatively, the individual in those situations may elect to yield to the

threat of contempt and cooperate affirmatively with his accusers eliminating the need for force, and in that sense, his will may be subverted. But in neither case is the intrusion an individual's dignity the same or as severe as the affront which occurs when the state secures from him incriminating evidence which can be obtained *only* by enlisting the cooperation of his will. Thus, I do not necessarily consider the results in *Holt* and *Schmerber* to be inconsistent with the purpose and proper reach of the Fifth Amendment privilege.[2]

But so long as we have a Constitution which protects at all costs the integrity of individual volition against subordinating state power, *Wade* and *Gilbert* must be viewed as legal anomalies. As Mr. Justice Fortas, joined by MR. JUSTICE DOUGLAS and the Chief Justice, argued on the day those cases were decided:

> "Our history and tradition teach and command that an accused may stand mute. The privilege means just that; not less than that. According to the Court, an accused may be jailed—indefinitely—until he is willing to say, for an identifying audience, whatever was said in the course of the Commission of the crime. Presumably this would include, 'Your money or your life'—or perhaps, words of assault in a rape case. This is intolerable under our constitutional system." *United States* v. *Wade*, 388 U. S., at 260. See also *Gilbert* v. *California*, 388 U. S., at 291–292 (Fortas, J., dissenting).

I fear the Court's decisions today are further illustrations of the extent to which the Court has gone astray

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[2] This is not to say that, apart from the Fifth Amendment privilege, there might not be, serious due process problems with physical compulsion applied to an individual's person to secure identifying evidence against his will. Cf. *Rochin* v. *California*, 342 U. S. 165 (1952). But cf. *Breithaupt* v. *Abram*, 352 U. S. 432 (1957).

in defining the reach of the Fifth Amendment privilege and has lost touch with the Constitution's concern for the "inviolability of the human personality." In both these cases, the Government seeks to secure possibly incriminating evidence which can be acquired only with respondents' affirmative cooperation. Thus, even if I did not consider the Fourth Amendment to require affirmance of the decisions of the Court of Appeals, I would nevertheless find it extremely difficult to accept a reversal of those decisions in the face of what seems to me the proper construction of the Fifth Amendment privilege.

II

The Court concludes that the exemplars sought from the respondents are not protected by the Fourth Amendment because respondents have surrendered their expectation of privacy with respect to voice and handwriting by knowingly exposing these to the public, see *Katz* v. *United States*, 389 U. S. 347, 351 (1967). But even accepting this conclusion, it does not follow that the investigatory seizures of respondents, accomplished through the use of subpoenas ordering them to appear before the grand jury—and thereby necessarily interfering with their personal liberty—are outside the protection of the Fourth Amendment. To the majority, though, "[i]t is clear that a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome." *Ante*, at —. With due respect, I find nothing "clear" about so sweeping an assertion.

There can be no question that investigatory seizures effected by the police are subject to the constraints of the Fourth and Fourteenth Amendments. In *Davis* v. *Mississippi*, 394 U. S. 721, 727 (1969), the Court observed that only the Term before, in *Terry* v. *Ohio*, 392 U. S. 1, 19 (1968), it had rejected "'the notions that the

Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search." '" As a result, the Court held in *Davis* that investigatory seizures for the purpose of obtaining fingerprints are subject to the Fourth Amendment even though fingerprints themselves are not protected by that Amendment.[3] The Court now seems to distinguish *Davis* from the present cases, in part, on the ground that in *Davis* the authorities engaged in a lawless dragnet of a large number of Negro youths. Certainly, the peculiarly offensive exercise of investigatory powers in *Davis* heightened the Court's sensitivity to the dangers inherent in Mississippi's argument that the Fourth Amendment was not applicable to investigatory seizures. But the presence of a dragnet was not the constitutional determinant there; rather, it was police interference with the petitioner's own liberty that brought the Fourth and Fourteenth Amendments into play, as should be evident from the Court's substantial reliance on *Terry* which involved no dragnet.

Like *Davis*, the present cases involve official investigatory seizures which interfere with personal liberty. The Court considers dispositive, however, the fact that the seizures were effected by the grand jury, rather than the police. I cannot agree.

First, in *Hale* v. *Henkel*, 201 U. S. 43, 76 (1906), the Court held that a subpoena *duces tecum* ordering "the production of books and papers [before a grand jury] may constitute an unreasonable search and seizure within the Fourth Amendment," and on the particular facts of the case, it concluded that the subpoena was "far too

[3] We left open the further question whether such an investigatory seizure might, under certain circumstances, be made on information insufficient to establish probable cause to arrest. See 394 U. S., at 727–728.

sweeping in its terms to be regarded as reasonable." Considered alone, *Hale* would certainly seem to carry a strong implication that a subpoena compelling an individual's personal appearance before a grand jury, like a subpoena ordering the production of private papers, is subject to the Fourth Amendment standard of reasonableness. The protection of the Fourth Amendment is not, after all, limited to personal "papers," but extends also to "persons," "houses," and "effects." It would seem a strange hierarchy of constitutional values that would afford papers more protection from arbitrary governmental intrusion than people.

The Court, however, offers two interrelated justifications for excepting grand jury subpoenas directed at "persons," rather than "papers," from the constraints of the Fourth Amendment. These are an "historically grounded obligation of every person to appear and give his evidence before the grand jury," *ante*, at —, and the relative unintrusiveness of the grand jury subpoena on an individual's liberty.

In my view, the Court makes more of history than is justified. The Court treats the "historically grounded obligation" which it now discerns as extending to all "evidence," whatever its character. Yet, so far as I am aware, the obligation "to appear and give evidence" has heretofore been applied by this Court only in the context of testimonial evidence, either oral or documentary. Certainly the decisions relied upon by the Court, despite some dicta, have not recognized an obligation of a broader sweep.

Blair v. *United States*, 250 U. S. 273, 281 (1919), indicated only that "the giving of *testimony* and the attendance upon court or grand jury in order to *testify* are public duties which every person . . . is bound to perform upon being properly summoned . . . ." (Emphasis added.) Similarly, just last Term, the Court reaffirmed

only that "[t]he power of government to compel persons to *testify* in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence," nothing more. *Kastigar* v. *United States*, 406 U. S. 441, 443 (1972) (emphasis added). And, Chief Justice Hughes described "one of the duties which the citizen owes to his government" to be that of "attending its courts and giving his *testimony* whenever his is properly summoned . . . ." *Blackmer* v. *United States*, 284 U. S. 421, 438 (1932). In short, history, at least insofar as heretofore reflected in this Court's cases, does not necessarily establish an obligation to appear before a grand jury for other than testimonial purposes. See *Branzburg* v. *Hayes*, 408 U. S. 665 (1972); *Ullmann* v. *United States*, 350 U. S. 422, 439 n. 15 (1956); *Piemonte* v. *United States*, 367 U. S. 556, 559 n. 2 (1961); *Wilson* v. *United States*, 221 U. S. 361, 372 (1911); *Hale* v. *Henkel*, 201 U. S., at 65. See also *United States* v. *Bryan*, 339 U. S. 323, 331 (1950); *Brown* v. *Walker*, 161 U. S. 591, 600 (1896); *Garland* v. *Torre*, 259 F. 2d 545, 549 (CA2), cert. denied, 358 U. S. 910 (1958).

In the present cases—as the Court itself argues in its discussion of the Fifth Amendment privilege—it was not testimony that the grand juries sought from respondents, but physical evidence. The Court glosses over this important distinction from its prior decisions, however, by artificially bifurcating its analysis of what is taking place in these cases—that is, by effectively treating what is done with individuals once they are before the grand jury as irrelevant in determining what safeguards are to govern the procedures by which they are initially compelled to appear. Nonetheless, the fact remains that the historic exception to which the Court resorts is not necessarily as broad as the context in which it is now employed. Hence, I believe that the question we must consider is whether an extension of that exception is warranted, and if so, under what conditions.

In approaching these questions, we must keep in mind that "[t]his Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment '. . . are to be regarded as of the very essence of constitutional liberty . . . .'" *Harris* v. *United States*, 331 U. S. 145, 150 (1947). As a rule, the Amendment stands as an essential bulwark against arbitrary and unreasonable governmental intrusion—whatever its form, whatever its purpose, see, *e. g.*, *Camara* v. *Municipal Court*, 387 U. S. 523 (1967)—upon the privacy and liberty of the individual, see, *e. g.*, *Terry* v. *Ohio*, 392 U. S. 1, 9 (1968); *Jones* v. *United States*, 362 U. S. 257, 261 (1960). Given the central role of the Fourth Amendment in our scheme of constitutional liberty, we should not casually assume that governmental action which may result in interference with individual liberty is excepted from its requirements. Cf. *Coolidge* v. *New Hampshire*, 403 U. S. 443, 455 (1971); *Katz* v. *United States*, 389 U. S. 347, 357 (1967); *Camara* v. *Municipal Court*, 387 U. S., at 528–529. The reason for any exception to the coverage of the Amendment must be fully understood and the limits of the exception should be defined accordingly. To do otherwise would create a danger of turning the exception into the rule and lead to the "impairment of the rights for the protection of which [the Amendment] was adopted." *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 357 (1931); cf. *Grau* v. *United States*, 287 U. S. 124, 128 (1932).

I

The Court seems to reason that the exception to the Fourth Amendment for grand jury subpoenas directed at persons is justified by the relative unintrusiveness of the grand jury process on an individual's liberty. The Court, adopting Chief Judge Friendly's analysis in *United States* v. *Doe (Schwartz)*, 457 F. 2d 895, 898 (CA2 1972), suggests that arrests or even investigatory

"stops" are inimical to personal liberty because they may involve the use of force; they may be carried out in demeaning circumstances; and at least an arrest may yield the social stigma of a record. By contrast, we are told, a grand jury subpoena is a simple legal process, which is served in an unoffensive manner; it results in no stigma; and a convenient time for appearance may always be arranged. The Court would have us believe, in short, that, unlike an arrest or an investigatory "stop," a grand jury subpoena entails little more inconvenience than a visit to an old friend. Common sense and practical experience indicate otherwise.

It may be that service of a grand jury subpoena does not involve the same potential for momentary embarrassment as does an arrest or investigatory "stop."[4] But this difference seems inconsequential in comparison to the substantial stigma which—contrary to the Court's assertion—may result from a grand jury appearance as well as from an arrest or investigatory seizure. Public knowledge that a man has been summoned by a federal grand jury investigating, for instance, organized criminal activity can mean loss of friends, irreparable injury to business, and tremendous pressures on one's family life. Whatever nice legal distinctions may be drawn between police and prosecutor, on the one hand, and the grand jury, on the other, the public often treats an appearance before a grand jury as tantamount to a visit to the station house. Indeed, the former is frequently more damaging than the latter, for a grand jury appearance has an air of far greater gravity than a brief visit "downtown" for a "talk." The Fourth Amendment was placed in our Bill of Rights to protect the individual citizen from such potentially disruptive governmental intrusion into his private life unless conducted reasonably and with sufficient cause.

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[4] But cf. *Davis* v. *Mississippi*, 394 U. S., at 727.

Nor do I believe that the constitutional problems inherent in such governmental interference with an individual's person are substantially alleviated because one may seek to appear at a "convenient time." In *Davis* v. *Mississippi*, 394 U. S., at 727, it was recognized that an investigatory detention effected by the police "need not come unexpectedly or at an inconvenient time." But this fact did not suggest to the Court that the Fourth Amendment was inapplicable; it was considered to affect, at most, the type of showing a State would have to make to justify constitutionally such a detention, see *ibid.* No matter how considerate a grand jury may be in arranging for an individual's appearance, the basic fact remains that his liberty has been officially restrained for some period of time. In terms of its effect on the individual, this restraint does not differ meaningfully from the restraint imposed on a suspect compelled to visit the police station house. Thus, the nature of the intrusion on personal liberty caused by a grand jury subpoena cannot, without more, be considered sufficient basis for denying respondents the protection of the Fourth Amendment.

Of course, the Fourth Amendment does not bar all official seizures of the person, but only those that are unreasonable and are without sufficient cause. With this in mind, it is possible at least to explain, if not justify, the failure to apply the protection of the Fourth Amendment to grand jury subpoenas requiring individuals to appear and *testify*. Thus, while it is true that we have traditionally given the grand jury broad investigatory powers, particularly in terms of compelling the appearance of persons before it, see, *e. g.*, *Branzburg* v. *Hayes*, 408 U. S., at 688, 701–702; *Blair* v. *United States*, 250 U. S., at 282, it must be understood that we have done so in heavy reliance on certain essential assumptions.

Certainly the most celebrated function of the grand jury is to stand between the Government and the citizen

and thus to protect the latter from harassment and unfounded prosecution. See, *e. g.*, *Wood* v. *Georgia*, 370 U. S. 375, 390 (1962); *Hoffman* v. *United States*, 341 U. S. 479, 485 (1951); *Ex parte Bain*, 121 U. S. 1, 11 (1887). The grand jury does not shed those characteristics which give it insulating qualities when it acts in its investigative capacity. Properly functioning, the grand jury is to be the servant of neither the Government nor the courts, but of the people. *Hale* v. *Henkel*, 201 U. S., at 61. As such, we assume that it comes to its task without bias or self-interest. Unlike the prosecutor or policeman, it has no election to win or executive appointment to keep. The anticipated neutrality of the grand jury, even when acting in its investigative capacity, may perhaps be relied upon to prevent unwarranted interference with the lives of private citizens and to ensure that the grand jury's subpoena powers over the person are exercised in only a reasonable fashion. Under such circumstances, it may be justifiable to give the grand jury broad personal subpoena powers that are outside the purview of the Fourth Amendment, for—in contrast to the police—it is not likely that it will abuse those powers.[5] Cf. *Costello* v. *United States*, 350 U. S. 359, 362 (1956); *Stirone* v. *United States*, 361 U. S. 212, 218 (1960).

Whatever the present day validity of the historical assumption of neutrality which underlies the grand jury process,[6] it must at least be recognized that if a grand jury is deprived of the independence essential to the assumption of neutrality—if it effectively surrenders that independence to a prosecutor—the dangers of ex-

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[5] When the grand jury does overstep its power and acts maliciously, courts are certainly not totally without power to control it. See n. 9, *infra*.

[6] Indeed, the Court today acknowledges that "[t]he grand jury may no longer always serve its historic role as a protective bulwark." *Ante*, at —.

cessive and unreasonable official interference with personal liberty are exactly those which the Fourth Amendment was intended to prevent. So long as the grand jury carries on its investigatory activities only through the mechanism of testimonial inquiries, the danger of such official usurpation of the grand jury process may not be unreasonably great. Individuals called to testify before the grand jury will have available their Fifth Amendment privilege against self-incrimination. Thus, at least insofar as incriminating information is sought directly from a particular criminal suspect,[7] the grand jury process would not appear to offer law enforcement officials a substantial advantage over ordinary investigative techniques.

But when we move beyond the realm of a grand jury investigations limited to testimonial inquiries, as the Court does today, the danger increases that law enforcement officials may seek to usurp the grand jury process for the purpose of securing incriminating evidence from a particular suspect through the simple expedient of a subpoena. In view of the Court's Fourth Amendment analysis of the respondents' expectations of privacy concerning their handwriting and voice exemplars and in view of the testimonial evidence limitation on the reach of the Fifth Amendment privilege, there is essentially no objection to be made once a suspect is before the grand jury and exemplars are requested. Thus, if the grand jury may summon criminal suspects for such purposes without complying with the Fourth Amendment, it will obviously present an attractive investigative tool to

[7] Of course, the grand jury does provide an important mechanism for investigating possible criminal activity through witnesses who may have first-hand knowledge of the activities of others. But given the Fifth Amendment privilege, it does not follow that the grand jury is a useful mechanism for securing incriminating testimony from the suspect himself.

prosecutor and police. For what law enforcement officers could not accomplish directly themselves after our decision in *Davis* v. *Mississippi*, they may now accomplish indirectly through the grand jury process.

Thus, the Court's decisions today can serve only to encourage prosecutorial exploitation of the grand jury process, at the expense of both individual liberty and the traditional neutrality of the grand jury. Indeed, by holding that the grand jury's power to subpoena these respondents for the purpose of obtaining exemplars is completely outside the purview of the Fourth Amendment, the Court fails to appreciate the essential difference between real and testimonial evidence in the context of these cases, and thereby hastens the reduction of the grand jury into simply another investigative device of law enforcement officials. By contrast, the Court of Appeals, in proper recognition of these dangers, imposed narrow limitations on the subpoena power of the grand jury which are necessary to guard against unreasonable official interference with individual liberty but which would not impair significantly the traditional investigatory powers of that body.

The Court of Appeals in *Mara*, No. 71–850, did not impose a requirement that the Government establish probable cause to support a grand jury's request for exemplars. It correctly recognized that "examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual," since the very purpose of the grand jury process is to ascertain probable cause. See, *e. g.*, *Blair* v. *United States*, 250 U. S., at 282; *Hendricks* v. *United States*, 223 U. S. 178, 184 (1912). Consistent with the Court's decision in *Hale* v. *Henkel*, it ruled only that the request for physical evidence such as exemplars should be subject to a showing of reasonableness. See 201 U. S., at 76. This "reasonableness" requirement has previously been ex-

plained by this Court, albeit in a somewhat different context, to require a showing by the Government that: (1) "the investigation is authorized by Congress"; (2) the investigation "is for a purpose Congress can order"; (3) the evidence sought is "relevant"; and (4) the request is "adequate, but not excessive, for the purposes of the relevant inquiry." See *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 209 (1946). This was the interpretation of the "reasonableness" requirement properly adopted by the Court of Appeals. See 454 F. 2d 580, 584–585. And, in elaborating on the requirement that the request not be "excessive," it added that the Government would bear the burden of showing that it was not conducting "a mere general fishing expedition under grand jury sponsorship." *Id.*, at 585.

These are not burdensome limitations to impose on the grand jury when it seeks to secure physical evidence, such as exemplars, that has traditionally been gathered directly by law enforcement officials. The essence of the requirement would be nothing more than a showing that the evidence sought is relevant to the purpose of the investigation and that the particular grand jury is not the subject of prosecutorial abuse—a showing that the Government should have little difficulty making, unless it is in fact acting improperly. Nor would the requirement interfere with the power of the grand jury to call witnesses before it, to take their testimony, and to ascertain their knowledge concerning criminal activity. It would only discourage prosecutorial abuse of the grand jury process.[8] The "reasonableness" requirement would

[8] It is, of course, true that a suspect may be called for the dual purposes of testifying and obtaining physical evidence. Obviously, his liberty would be interfered with merely as a result of appearing and testifying, a situation in which the Fourth Amendment has not heretofore been applied. But it does not follow that the application of the Fourth Amendment is inappropriate when a suspect

do no more in the context of these cases than the Constitution compels—protect the citizen from unreasonable and arbitrary governmental interference, and ensure that the broad subpoena powers of the grand jury which the Court now recognizes are not turned into a tool of prosecutorial oppression.[9]

In *Dionisio*, No. 71–229, the Government has never made any showing that would establish the "reasonableness" of the grand jury's request for a voice sample. In *Mara*, No. 71–850, the Government submitted an affidavit to the District Court to justify the request for the handwriting and printing exemplars. But it was not sufficient to meet the requirements set down by the Court of Appeals. See 454 F. 2d, at 584–585. Moreover, the affidavit in *Mara* was reviewed by the District Court *in camera* in the absence of respondent Mara and his

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is subpoenaed for these dual purposes. The application of the Fourth Amendment is necessary to discourage unreasonable use of the grand jury process by law enforcement officials. While the Fifth Amendment privilege at least contributes to that goal in the context of a subpoena intended to secure both testimonial and physical evidence, it is essential also to apply the Fourth Amendment when the suspect is requested to give physical evidence. Otherwise, subpoenaing suspects for the purpose of testifying would provide a simple guise by which law enforcement officials might secure physical evidence without complying with the Fourth Amendment, and thus the deterrent effect on such officials sought by applying the Amendment to grand jury subpoenas seeking physical evidence would be lost.

[9] It may be that my differences with the Court are not as great as may first appear, for despite the Court's rejection of the applicability of the Fourth Amendment to grand jury subpoenas directed at "persons," it clearly recognizes that abuse of the grand jury process is not outside a court's control. See *ante*, at —. Besides the Fourth Amendment, the First Amendment and both the Due Process Clause and the privilege against compulsory self-incrimination contained in the Fifth Amendment erect substantial barriers to "the transformation of the grand jury into an instrument of oppression." *Ibid.* See also *Hale* v. *Henkel*, 201 U. S., at 65; *United States* v. *Doe* (*Schwartz*), 457 F. 2d., at 899.

counsel. Such *ex parte* procedures should be the exception, not the rule.

> "Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment . . . demands." [10] *Alderman* v. *United States*, 394 U. S. 165, 184 (1967).

See also *Dennis* v. *United States*, 384 U. S. 855, 873–875 (1966). Consequently, I agree with the Court of Appeals that the reasonableness of a request for an exemplar should be tested in an adversary context.[11]

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[10] As the Court of Appeals observed:

"[D]ifficulties in locating a suspect or possessor of evidence, the problems of apprehension, the destructibility of evidence, the need for promptness to protect the public against violence and to prevent repetition of criminal conduct necessitates the *ex parte* nature of the warrant issuance proceeding." 454 F. 2d, at 583.

But these considerations do not apply in the context of a grand jury request for exemplars. Nevertheless, the Government contends that the traditional secrecy of the grand jury process dictates that any preliminary showing required of it should be made in an *ex parte*, *in camera* proceeding. However, the interests served by the secrecy of the grand jury process can be adequately protected without such a drastic measure, see *id.*, at 584.

[11] The Court suggests that any sort of showing which might be required of the Government in cases such as these "would saddle a grand jury with mini-trials" and "would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *Ante*, at —. But constitutional rights cannot be sacrificed simply for expedition and simplicity in the administration of the criminal laws. Moreover, a requirement that the Government establish the "reasonableness" of the request for an exemplar would hardly be so burdensome as the Court suggests. As matters stand, if the suspect resists the request, the Government must seek a judicial order directing that he comply

I would therefore affirm the Court of Appeals' decisions reversing the judgments of contempt against respondents and order the cases remanded to the District Court to allow the Government an opportunity to make the requisite showing of "reasonableness" in each case. To do less is to invite the very sort of unreasonable governmental intrusion on individual liberty that the Fourth Amendment was intended to prevent.

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with the request. Thus, a formal judicial proceeding is already necessary. The question whether the request is "reasonable" would simply be one further matter to consider in such a proceeding.